117-129-139

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 934.

THE STATE OF TENNESSEE, PLAINTIFF IN ERROR,

vs.

GEORGE K. WHITWORTH, TRUSTEE OF DAVIDSON COUNTY, TENNESSEE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED SEPTEMBER 10, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Middle District of Tennessee, Circuit Court of the United States for said District.

STATE OF TENNESSEE
vs.
GEO. K. WHITWORTH, Tr., &c. } No. 2658.

Be it remembered that on the 28th day of December, 1883, a transcript from the Davidson county circuit court, State of Tennessee, was filed in this court, which transcript is in the words and figures following, to wit:

Caption.

STATE OF TENNESSEE *vs.* GEO. K. WHITWORTH, Tr., &c,

Pleas at the court-house, in the city of Nashville, county of Davidson and State aforesaid, on the third Monday, being the 17th day of September, in the year of our Lord one thousand eight hundred and eighty-three and in the 108th year of our American Independence.

Present: The Hon'l Frank T. Reid, one of the judges of the
2 circuit courts of the State of Tennessee, and assigned to hold the circuit courts of the eighth judicial district in said State.

Petition.

Filed July 30th, 1883.

H. C. HUDSON, *D. Clk.*

This petition has been lost or mislaid.

H. C. HUDSON, *D. C.*

Minute Entry.

SATURDAY MORNING, *Oct. 6th*, 1883.

Court met pursuant to adjournment.

Present, &c.: Hon'l Frank T. Reid, judge, &c.

STATE OF TENNESSEE *vs.* GEO. K. WHITWORTH.

In this cause, by agreement of counsel for the plaintiff and defendant, it is ordered that the petition and writ be amended so that the mayor and city council of Nashville be made a party relator, but the defendant shall be allowed to make such additional defense as he may be advised shall be necessary on account of the amendment thus made.

Minute Entry.

SATURDAY MORNING, *Dec. 15th*, 1883.

Court met according to adjournment.

Present: The Hon. Frank T. Reid, judge.

STATE OF TENNESSEE
vs.
GEO. K. WHITWORTH, Tr., &c. } Mandamus. N. and D. R. R. Stock.

3 In this cause it appears, by the statement of the counsel that the original petition in the cause has been lost or mislaid and cannot be found, and by consent of parties the copy served on the defendant is substituted and ordered to be amended. Filed this day, and stand in lieu of the original petition.

Petition.

Filed Dec. 15th, 1883, by order of the court.

H. C. HUDSON, *D. C.*

(Filed July 30th, 1883.)

H. C. HUDSON, *D. C.*

To the Hon'l Frank T. Reid, judge of the circuit court of Davidson county, Tennessee:

The petition of the State of Tennessee, on her own behalf and on the relation of Davidson county against Geo. K. Whitworth, trustee of Davidson county, Tennessee. Your petitioner would respectfully state and show your honor as follows: On the 23 day of Jan'y, 1852, the Legislature passed an act incorporating the Tennessee and Alabama Railroad Company for the purpose of constructing a railroad from the city of Nashville by the way of Franklin to the line between the State of Tennessee and Alabama. By the second section of said act the company was allowed to increase or diminish
4 its capital stock in its discretion. The shares of stock were to be of the par value of fifty dollars each. The said company organized under its charter and proceeded to the construction of its road. On the 30 day of November, 1853, the Legislature passed an act incorporating the Central Southern Railroad Company for the purpose of constructing a railroad from a point of intersection with the Tennessee and Alabama railroad at Columbia, in Maury county, by way of Pulaski, in Giles county, to the Alabama line. By section 16th of said act the capital stock of said company is fixed at one million dollars to be divided into shares of fifty dollars each, and the company shall have power to increase the capital stock to any amount sufficient to insure the completion of said road. The said company organized under said charter and proceeded to construct their road. On the 19th day of April, 1866, the Legislature passed an act (acts 1865–6, page 218), authorizing the consolidation of the two above-named railroad companies into one company under the name of the Nashville & Decatur Railroad Company, and the said new organization was constituted a body politic and corporate under said names on the 8th day of
5 March, 1867, (acts, 1866–7, page 159,) the action of the directors and stockholders in consummating the consolidation was ratified by an act of the Legislature.

The new corporation thus established took charge of the line of

road theretofore constructed, and has been since that time, and is now, a body politic and corporate, with its principal office and place of business in the city of Nashville. The said corporation has issued stock to a large amount, namely, $1,356,000.00, to various persons unknown to petitioner, but the petitioner is informed and believes and so states that W. M. Duncan, a resident of Davidson county, is the owner and holder of shares of the stock of said company worth $——; that John Orr, a citizen of Davidson county, also is the owner and holder of shares of said stock worth $——. Petitioner will state that the revenue laws of the State require that the shares of stock in all incorporated institutions shall be assessed for taxation at their value; that the shares of stock in said Nashville and Decatur Railroad Company have never been assessed for taxation for State, county, or municipal purposes. The reason
6 for the failure to assess said shares for taxation is, as petitioner is informed, that the shareholders claim the shares are exempt from taxation under the charter of said company. The clauses in the charters of the several companies above-mentioned which bear upon this subject are as follows: In the charter of the Tennessee and Alabama R. R. Co. the language is, "and said company shall have all the rights, powers, and privileges, and be subject to all the liabilities and restrictions conferred and imposed upon the charter of the Nashville and Chattanooga Railway Company, and all the various amendments, &c., thereto." The clause in the charter of the Central Southern R. R. Co. on this point is substantially the same as above. The charter of the Nashville & Decatur R. R. Company provides as follows: "That the said Nashville & Decatur Railroad Company shall for its government be entitled to all the rights and privileges and subject to all the restrictions and liabilities conferred and imposed upon the Nashville & Chattanooga R. R. Company." The clause in the Nashville & Chattanooga Railroad Company is as follows: The capital stock of said company shall
7 forever be exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for a period of twenty years from the completion of the railroad, and no longer. (Sec. 38, acts 1845–'6, p. 27.)

Petitioner insists that the shareholders' claim of exemption from taxation is untenable; that the charter of the Nashville & Chattanooga Railroad Company excepts only the capital stock of the company and not the individual shares, and moreover, that the grant to the Nashville & Decatur R. R. Co. of the rights and privileges of the Nashville & Chattanooga R. R. Co. does not carry with it any exemption from taxation whatever. Petitioner therefore insists that said shares of stock are subject to taxation and should be assessed as other property. By the act of 7th March, 1879, all collections of taxes are made. Assessors to assess any property which by mistake of law or fact has been omitted from the assessment roll. This act passed 28th Mch. 1883, requiring the assessment to be made
8 for all previous years during which there had been an omission to assess. The shares of stock in said R. R. Co. are there-

fore subject to assessment for the present year and for all the previous years since their issuance. The defendant, Whitworth, is the trustee of Davidson, and as such is the collector of petitioner's taxes for the county of Davidson. Petitioner has, through its comptroller of the treasury, made a demand upon the said Whitworth to make the assessment of said shares of stock for taxation in accordance with the act of 7th M'ch, 1879, and the amendatory act of March 28th, 1883, but he has refused to make said assessment.

The premises considered, petitioner prays that an alternative writ of mandamus issue, directed to the Geo. K. Whitworth, trustee, &c., commanding him to appear before this hon'l court upon a day certaid, and show cause why he should not assess for taxation the shares of stock of the Nashville and Decatur R. R. Co. owned and held by the said W. M. Duncan and Jno. Orr, and also other shares of stock of said company owned and held by any other person whomsoever, and that upon final hearing a peremptory writ of mandamus issue directed to said Whitworth, trustee, &c., commanding him to make the assessment as prayed for above.

CHAMPION & HEAD & J. B. DANIEL,
S. WATSON AND J. W. BAKER,
Att'ys for State.

9 STATE OF TENNESSEE, *Davidson County:*

Personally appeared before J. B. Brown, J. P. for said county, S. A. Champion, agent and attorney for the petitioner, State of Tennessee, and made oath that the statements contained in the foregoing petition are true to the best of his knowledge, information, and belief.

S. A. CHAMPION.

Sworn to and subscribed before me, 23d July, 1883.
J. B. BROWN, *J. P.*

To the clerk of the circuit court:

Issue the alternative writ of mandamus, returnable to the 1st day of August, 1883.
28th July, 1883.

FRANK T. REID, *Judge.*

Writ was never issued; service was acknowledged on original.
H. C. HUDSON, *D. Clk.*

Motion. Filed Aug. 4th, 1883. *H. C. Hudson, D. C.*

N. and D. R. R. Case.

In the Circuit Courts of Davidson County.

THE STATE OF TENNESSEE, on her own behalf and on the relation of Davidson County,

vs.

GEO. K. WHITWORTH, Trustee of Davidson County, Tennessee.

The defendant moves the court to dismiss the petition filed in this case upon the following grounds:

10 1st. The State of Tennessee have neither any interest in the taxes due to the other and therefore cannot be joined as co-petitioners for mandamus to compel an assessment for taxes due to other.

2d. The granting of the prayer of the petitioner involves, in a collateral manner, the rights of every stockholder of the Nashville and Decatur Railroad Company, and yet none of these stockholders have been made parties to this suit.

3d. The shares of the capital stock of said company are exempt from taxation under the charters of the Tennessee and Alabama and Central Southern Railroad Companies and under the statutes of Tennessee authorizing the consolidation of those companies under the name of the Nashville & Decatur Railroad Company, and the obligation of the contract contained in said charters and statutes is impaired by the subsequent statutes of said State, relied on as directing the assessment of said shares. Said subsequent statutes are therefore violative of the Constitution of the United States, and *and* this defendant cannot be required to act in execution of them.

11 4th. The shares of said stock, if taxable at all, must be assessed to the various parties to whom they respectively belonged in the various years since they were issued, and at their respective values during those years. The petition does not state names of those owners, nor the value of the shares during those years, and there is no law providing any means by which defendant can ascertain these facts.

5th. As required by law defendant has turned over the tax-books for 1882 and previous years, and he now has no books upon which to assess for any of those years. He has not received the books for 1883, as he is not yet entitled to them.

6th. No man is authorized to institute a suit on behalf of the State of Tennessee unless the authority is conferred by statute, and there is no statute authorizing the institution of this suit, so far as it is a suit on behalf of the State.

ED. BAXTER,
Att'y for Def't.

Petition and Bond.

Filed Dec. 15th, 1883.

H. C. HUDSON, *D. C.*

The State of Tennessee on her own behalf and on the relation of Davidson county, *vs.* Geo. K. Whitworth, trustee of Davidson county, Tennessee.

12 In the Circuit Court of Davidson County, Tennessee.

To the Hon'l Frank T. Reid, judge of said court:

Your petitioner, Geo. K. Whitworth, of Davidson county, Tennessee, a citizen of said county and State, and defendant in the above-entitled cause, respectfully shows to this honorable court that

the original petition filed in this cause prays for a mandamus to compel your petitioner to assess all the shares of stock of the Nashville and Decatur Railroad Company for taxes for the current year, and all preceding years back to 1867, when said company was organized; that the said shares of stock are by said company and the stockholders claimed to be exempt under certain provisions of said companies charter, and therefore said suit is one arising under the Constitution of the United States. The taxes would, if assessed or demanded in said suit, amount to more than five thousand dollars, and therefore the matter and amount in dispute exceeds, exclusive of costs, the sum of or value of five thousand dollars.

Your petitioner offers herewith a bond, with good and sufficient surety for his entering into the circuit court of the United States for the middle district of Tennessee, at Nashville, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said United States circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto. That your petitioner has filed a motion to dismiss the original petition in this case, but has filed no answer and has raised no issue of fact, and the present is the first term of this honorable court at which said suit could be tried upon its merits.

13

Your petitioner prays this honorable court to proceed no further in said suit, except to make this order of removal required by law, and to accept said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the middle district of Tennessee, at Nashville; and your petitioner will ever pray, &c.

GEO. K. WHITWORTH,
Trustee of Davidson Co.
ED. BAXTER,
Att'y for Petitioner.

14

STATE OF TENNESSEE, *Davidson County:*

Ed. Baxter, atttorney for petitioner, makes oath that the facts stated in the foregoing petition are true, as he verily believes.

ED. BAXTER.

Sworn to and subscribed before me, Dec. 15th, 1883.

H. C. HUDSON, *D. C.*

Know all men by these presents that I, George K. Whitworth, trustee of Davidson county, as principal, and Ed. Baxter and Wm. M. Duncan, as sureties, are held and firmly bound unto the State of Tennesse and Davidson county in the penal sum of five hundred dollars, the payment whereof, well and truly to be made unto said State of Tennessee and Davidson county, we bind ourselves our heirs, representatives, and assigns, jointly and severally, firmly, by these presents; yet, upon these conditions *these conditions* the said Whitworth, trustee, &c., having petitioned the circuit court of Davidson county, Tennessee, for the removal of a certain cause therein

pending, wherein the State of Tennessee, on her own behalf and on the relation of Davidson county is plaintiff, and the said
15 Whitworth, trustee, &c., is defendant, to the circuit court of the United States in and for the middle district of Tennessee, at Nashville:

Now, if the said Whitworth, trustee, your petitioner, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise, remain in full force and virtue.

Witness our hands, this 15th day of Dec., 1883.

GEO. K. WHITWORTH,
By ED. BAXTER, *Att'y.*
ED. BAXTER, *Security.*
W. M. DUNCAN, *Sec'y.*

Minute Entry.

SATURDAY MORNING, *Dec. 15th*, 1883.

Court met pursuant to adjournment.

Present: The Hon'l Frank T. Reid, judge, &c.

STATE OF TENNESSEE, on her own behalf and on the relation of Davidson County,

vs.

GEO. K. WHITWORTH, Trustee of Davidson County, Tennessee.

16 On the pleadings and proceedings herein and on the petition and bond filed herein by the defendant, in the above-entitled action, under the provision of an act of the Congress of the United States passed March 3d, 1875, entitled An act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes, and on motion of attorney for defendant, it is ordered that the bond and security offered by the said defendant be approved; that this court proceed no further in the cause, and that this cause be removed into the circuit court of the United States for the middle district of Tennessee, at Nashville.

Bill of Costs.

State tax, 2.50; county tax, 1.25	$3 75
Filing petition, 25; filing motion, 25; 2 docketing cause, 20; 2 orders, 50; motion & order of removal, 75; filing petition & bond, 50; docketing bill costs, 50; copy bill costs, 25; transcript & seal, 5.00	8 20
Total	$11 95

17 STATE OF TENNESSEE, *Davidson County:*

I, J. E. Aldrich, clerk of the circuit court of said county and State

aforesaid certify the foregoing to be a full, true, and correct transcript of the record and bill of costs in case of State of Tennessee and State of Tennessee for use of Davidson County *vs.* Geo. K. Whitworth, trustee, &c., as the same remains of record and on file in my office.

Witness my hand and seal of office at office in Nashville, this 27th day of December, 1883, in the 108 year of our Independence.

J. E. ALDRICH, *Clk.*
By H. C. HUDSON, *D. C.*

[Endorsed:] Filed Dec. 28th, 1883. Lewis T. Baxter, cl'k U. S. cir. court.

Answer.

The answer of Geo. K. Whitworth, trustee of Davidson county, Tennessee, to the petition filed by the State of Tennessee against him in the circuit court of Davidson county, Tennessee, and removed to the United States circuit court for the middle district of Tennessee, sitting at Nashville, in said State, for answer to so much of said petition as he is advised it is material for him to answer, respondent says:

18 I. That on Jan'ry 23d, 1852, the Legislature of Tennessee passed an act incorporating the Tennessee and Alabama Railroad Company for the purpose of constructing a railroad from the city of Nashville by the way of Franklin to the line between the States of Tennessee and Alabama in the direction of Florence, in the State of Alabama. The second section of said act provides that "the capital of said company shall be subject to be increased or decreased in the discretion of said company, to be divided into shares of fifty dollars each, and whenever five thousand shares of the capital stock is subscribed for the company, may organize, &c." The said company were duly organized under said charter, and constructed a railroad from Nashville to Columbia, with a branch from Columbia to Mount Pleasant, in the State of Tennessee. Said road was completed on the — day of ——, 1859.

II. Said Legislature on Nov. 30th, 1853, passed an act incorporating the Central Southern Railroad Company for the purpose of constructing a railroad from a point of intersection with the Tennessee and Alabama railroad at Columbia, in Maury county, by
19 way of Pulaski, in Giles county, to the Alabama line in the direction of Athens and Decatur, Alabama, to connect with any railroad that may be constructed from Decatur, Alabama, to the said State line in the direction of Pulaski. The 16th section of said act provides that "the capital stock of said company shall be one million of dollars, to be divided into shares of fifty dollars each, and the company shall have power to increase the capital stock to any amount sufficient to insure the completion of said road; and whenever one thousand shares of the capital stock shall have been subscribed for said company may organize, &c." Said company were duly organized under said charter, and constructed their road from Columbia, Tennessee, to the line between the States of Tennessee and Alabama. Said road was completed Nov. 20th, 1860.

III. On December 19th, 1853, the Legislature of Alabama passed an act incorporating the Tennessee and Alabama Central Railroad Company, for the purpose of constructing a railroad from Monticello through Decatur and Athens, Alabama, to the line between
20 the States of Alabama and Tennessee, thence to connect with a railroad leading through Pulaski to Columbia, Tennessee. The 4th section provides that "the capital stock of said railroad company may be one and a half million of dollars, in shares of twenty-five dollars each, with the privilege of increasing said stock to three million of dollars should said increase be found necessary for its construction and future management." Section 22 provides that "said railroad company shall have the power to unite and consolidate into one road all or such part of the said road with any railroad that may connect with the said Tennessee and Alabama Central railroad at the Tennessee line at the point at which the said Tennessee and Alabama railroad may touch said Tennessee line." Said company were duly organized in Alabama under said charter. All of the capital stock of said company that was ever subscribed for was subscribed for and owned by citizens of and residents of the
21 State of Alabama, and none of it was ever subscribed for or owned by any of the citizens or residents of the State of Tennessee. The road was constructed from Decatur, Alabama, through Athens to the line between the States of Alabama and Tennessee, and the road, with all its property, rights, privileges, and franchises, was exclusively in the State of Alabama, and no part thereof was ever within the jurisdiction of the State of Tennessee. Said road was completed in November, 1859.

IV. For some time after said three railroads were completed they were operated as independent roads by their respective companies, and though their aggregate length, from Nashville, Tennessee, to Decatur, Alabama, was only about 122 miles, through passengers were compelled to change cars and recheck baggage at Columbia and Pulaski, and through freight had to be reshipped at these points. To save the public the expense, annoyance, and delay of these changes the Legislature of Tennessee, on April 19th, 1866, passed an act, of which the 5th section is as follows: "That for the purpose of uniting and consolidating the Tennessee and Alabama Railroad Company and the Central Southern Railroad Company into
22 one, the directors of said companies be, and they are hereby, authorized to agree upon the terms thereof, and to adopt all necessary and proper measures, agreements, and obligations to effect the same: Provided said terms of consolidation, when perfected by the directors of said companies, shall be submitted to a vote of the stockholders of said companies, and if assented to by a majority of the stockholders the same shall be binding upon said companies, and that thereafter and upon official report thereof to the presidents of the respective companies and the comptroller of the State said consolidated and united companies shall be known and styled as the Nashville and Decatur Railroad Company, by which name it shall sue and be sued, and be entitled to all the rights and privi-

leges and be subject to all the liabilities and restrictions of a body corporate."

The 6th section is as follows: "That the said Nashville and Decatur railroad shall, for its government, be entitled to all the rights and privileges and subject to all the restrictions and liabilities conferred and imposed upon the Nashville and Chattanooga Railroad Company: Provided, That no State aid is intended to be ex-
23 tended to said Nasville and Decatur railroad: Provided further, That no new liability to the State of Tennessee is intended to be imposed hereby upon said Tennessee and Alabama Railroad Company and the Central Southern Railroad Company."

The 7th section is as follows: "That the directors of said Tennessee and Alabama Railroad Company, in maturing the terms of consolidation hereinbefore provided, may adopt such by-laws, rules, and regulations, not inconsistent with the laws of Tennessee and the United States, as may be necessary and proper to the successful operation of said consolidated company, and may provide in said terms for the discharge of their respective indebtedness, so as to bind said consolidated company therefor; provided, that nothing in this act shall be construed to alter or effect the lien of the State of Tennessee for aid heretofore extended to said companies, but the same shall be extended and held as liability against said consolidated company." The 8th section is as follows: "That an election shall be held by the stockholders of the Tennessee and Alabama railroad and the Central Southern railroad jointly, on the first Monday in
May next, at the town of Pulaski, in Giles county, for direc-
24 tors for said roads thus combined, who shall be elected in the same manner as is now provided by the Tennessee and Alabama railroad in its charter, and shall hold their office for one year and until their successors are elected and qualified." The 9th section is as follows: "That the Tennessee and Alabama railroad and the Central Southern railroad thus consolidated may, through their directors thus elected, be consolidated with the Alabama and Tennessee Central railroad upon such terms as may be agreed upon between them and approved by the stockholders of said roads, to be thereafter known as the Nashville & Decatur railroad; such terms not to be in conflict in any wise with those herein contained, but may be supplemental or in addition thereto: Provided the consolidation herein provided for be approved by act of the Legislature of Alabama, heretofore or hereafter passed. And said railroads thus consolidated may, by their stockholders regularly convened upon thirty days' notice in the newspapers of Nashville and Huntsville, electd irectors to serve them for the term of twelve months and until their successors shall be elected." The 10th section is as
25 follows: "That the capital stock of said united companies shall be the aggregate amount of their respective charters with the addition thereto of $——, and that this act shall take effect from and after its passage." See acts of 1865–6, p'g. 219,220.

The consolidation provided for by said statute was approved by an act of the Legislature of Alabama. The terms of the consolidation were, by appropriate action, referred to an executive com-

mittee, which committee embodied the suggestions in the form of a resolution, which was as follows:

"Resolved, That under the authority delegated to the executive committee by the respective stockholders of the Tennessee and Alabama, Central Southern, Tennessee and Alabama Central Railroad Companies the committee have agreed that the capital stock of each company shall represent the value of its road, and that, therefore, each of the companies herein mentioned shall surrender to the Nashville and Decatur Railroad Company all of its rights, franchises, and property, the Nashville and Decatur Railroad Company assuming to pay all debts owing by the several companies,
26 and being hereby especially pledged to protect all persons who have made themselves individually liable for the debts of any of the several companies, and that the stockholders of each company shall be entitled to and receive credit for the same amount of stock in the Nashville and Decatur Railroad Company that they own in any of the several companies; these constituting and comprising the whole basis of settlement."

On Nov. 21st, 1866, at a convention of stockholders of the Tennessee and Alabama, the Central Southern, and the Tennessee and Alabama Central Railroad Companies, the resolution aforesaid was unanimously confirmed by the convention, and the three roads were "declared to be united and consolidated under the style of The Nashville and Decatur Railroad." On March 8th, 1867, the General Assembly of the State of Tennessee passed an act, the first section of which is as follows: "That the consolidation aforesaid be, and the same is hereby, as fully confirmed in all respects as if the convention had been held on the 1st Monday in May, 1866, and
27 that the said consolidation and all acts of said convention be, and the same are hereby, declared valid."

V. The stock of the Nashville and Decatur Railroad Company is now owned by various individuals and corporations. Only about $1,192,500.00 of it is owned by citizens or residents of Davidson county, Tennessee, and about $717,000.00 *dollars* of it is owned by non-residents of the State of Tennessee, who have the certificates therefor in their possession, beyond the jurisdiction of said county and State, as respondent is informed, believes, and so charges.

VI. At the time said consolidation was made the stock of the Nashville and Decatur Railroad Company was comparatively of no commercial value. Much, if not most of it, has changed owners, and much of it has changed owners many times since the consolidation. The market value of the stock has changed from time to time, ranging from 10 cents on the dollar in 1870 to 85 cents on the dollar in 1883 of its par value. Respondent files as Exhibit "A" to this answer a statement taken from the stock quotations of the Nashville American, showing its market value from year to
28 year, from the 10th day of March, 1870, to the 26th day of October, 1883.

VII. It is true that the Nashville and Decatur Railroad Company, as soon as the consolidation was effected, took charge of the line of road from Nashville to Decatur, and has been since that time, and

is now, a body politic and corporate, with its principal office and place of business in the city of Nashville.

VIII. It is true that the Nashville and Decatur Railroad Company has issued stock to the amount, and probably *to* the amount, stated in the petition. The act authorizing the consolidation provides that the capital stock of said united companies should be the aggregate amount of their respective charters, and the articles of consolidation provided that the stockholders of each of the original companies should be entitled to and receive credit for the same amount of stock in the Nashville and Decatur Railroad Company that they owned in any of the several companies. It was in that way that the amount of stock issued by the Nashville and Decatur Railroad Company came to be so large.

IX. It is true, as respondent is informed, that W. M. Dun-
29 can, a resident of David-on county, is the owner and holder of —— shares of the stock of said company, with $8—; that John Orr, a citizen of said county, is also the owner and holder of —— shares of said stock, worth $——, and that various other persons unknown to respondent are owners and holders of said stock, but how many shares of stock they own or what it is worth respondent does not know.

X. As to the averment in the petition that the revenue laws of the State of Tennessee require that the shares of stock in all incorporated institutions shall be assessed for taxation at their value, respondent supposes that it raises a question of law for the decision of the court, but respondent calls the attention of the court to the fact that the act of the Legislature of Tennessee, approved Mch 30th, 1883, which requires that stockholders in corporations shall be assessed and taxed on the value of their shares of stock therein, contains a proviso that the property and shares of stock in companies organized under the laws of the State of Tennessee and engaged in manufacturing articles of the produce of that State shall be assessed as one property in the same manner as the prop-
30 erty of firms and individuals is assessed. In other words, while the laws of Tennessee require that railroads with all their property, rights, and franchises shall be assessed for taxation to the corporations owning them, and in addition thereto require the stockholders in such railroad companies to pay taxes upon the value of their shares of stock in such railroad companies, the act of March 30th, 1883, referred to above, relieves the stockholders in Tennessee corporations engaged in manufacturing articles of the produce of that State from all taxes upon their shares of stock in such company. Respondent submits that the discrimination against the stockholders of railroad companies and of all other corporations, except such as may be engaged in the manufacture of articles from the produce of the State of Tennessee, is violation of article II, section 8, of the constitution of the State of Tennessee, which ordains that "the Legislature shall have no power to suspend any general law for the benefit of any particular individual; nor to pass any law for the benefit of individuals inconsistent with the
31 general laws of the land; nor to pass any law granting to

any individual or individuals, rights, privileges, or immunities, or exemptions other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law."

XI. Respondent admits that the shares of stock in said Nashville and Decatur Railroad Company has never been assessed for taxation for State, county, or municipal purposes, and that the reason for the failure to assess said shares for taxation is that the shareholders in said company claim that said shares are exempt from taxation under the charter of said company.

The first section of the charter of the Tennessee and Alabama Railroad Company provides "that said company shall have all the rights, powers, and privileges, and be subject to all the liabilities and restrictions conferred and imposed upon the charter of the Nashville and Chattanooga R. R. Co., and of the various amendments thereto."

The 15th section of the charter of the Central Southern Railroad Company provides "that the said company shall have all the
32 powers and privileges and be subject to all the restrictions and liabilities prescribed in the charter of the Nashville and Chattanooga Railroad Company, and in the various amendments thereto, except as hereinafter prescribed." The 20th section of said charter is as follows: "That the 13th section of the act passed Dec. 11th, 1845, incorporating the Nashville & Chattanooga Railroad Company, shall not be a part of this act." The 39th section of the charter of the Nashville & Chattanooga R. R. Co., enacted by the Legislature of Tennessee on Dec. 11th, 1845, is as follows: "That the capital stock of said company shall forever be exempt from taxation, and the road, with all of its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for a period of twenty years from the completion of the road, and no longer." It is claimed by the stockholders of the Nashville and Decatur R. R. Co. that the words "capital stock" in the charter of the Nashville & Chattanooga R. R. Co., referred to above, mean the aggregate of the stock made up of the shares of the stockholders, and that the exemption of the capital stock was intended to exempt the shares of the
33 stockholders. Respondent has been informed that Chancellor Cooper, in construing the charter of the Memphis & Charleston Railroad Company, which contained the same words, did have that meaning and effect, and his decision in that case was affirmed by the supreme court of the State. The stockholders in the Nashville & Decatur Railroad Company insist that the shares of stock in the Tennessee and Alabama Railroad Company and the Central Southern Railroad Company were exempt from taxation in Tennessee, inasmuch as those companies were given all the powers, rights, and privileges of the Nashville & Chattanooga Railroad Company; that the shares of stock in the Tennessee and Alabama Central Railroad Company, created by the State of Alabama, were also exempt from taxation in Tennessee, because the road of that company, with all its fixtures and appurtenances, was situated in the

State of Alabama, and all of the stock in said company was held and owned in that State. They insist that, under the legislation above referred to authorizing and ratifying the consolidation of
34 these three companies under the name of the Nashville & Decatur Railroad Company, the exemption from taxation in Tennessee, which belonged to the stock in the three original companies, passed to the stock of the Nashville and Decatur Railroad Company; and, as the subsequent legislation of Tennessee directing said stock to be assessed for taxation impairs the obligation of the contract contained in said charters and in the acts of the Legislature authorizing and ratifying said consolidation, said stockholders insist that it violates Article I, Section 10, of the Constitution of the United States, which ordains "that no State shall pass any law impairing the obligation of contracts;" and, as it has been the general understanding in this State that said stock was exempt from taxation, respondent did not feel authorized to act in execution of a law that was violative of the Constitution of the United States, and therefore has refused to assess said shares for taxes. Respondent will file duly authenticated copies of the statutes of the State of Tennessee and Alabama referred to above.

XII. Respondent submits that, as the prayer of the petition
35 in this case involves, in a collateral manner, the rights of every stockholder of the Nashville and Decatur Railroad Company, it ought not to be granted in the absence of said stockholders, none of whom are made parties to the record.

XIII. Respondent submits for the construction of the court the acts of the Legislature of Tennessee, passed March 7th, 1879, and March 28th, 1883, referred to in the petition as authorizing collectors of taxes to assess property which by mistake of law or fact has been omitted from the assessment roll, whether they are violative of the constitution of the State of Tennessee and whether they were intended to be retrospective in their operation are questions which respondent respectively submits to the consideration of the court.

XIV. Respondent admits that he is trustee of Davidson county, and as such is the collector of taxes due to the State of Tennessee and to the county of Davidson assessed in that county. It is true that the State of Tennessee did, through the comptroller of its treasury, make a demand upon respondent to assess said shares of stock for taxation, and he did refuse to make said assessments for the reasons given above, and having fully answered, respondent
36 prays to be hence dismissed with his reasonable costs.

ED. BAXTER,
Solicitor for Defendant.

Complainant waives the oath and signature of the defendant.
S. WATSON, DODD AND LAXTER,
CHAMPION AND HEAD.

Filed May 22d, 1884. LEWIS T. BAXTER,
Clk U. S. Cir. Ct.

Demurrer.

STATE OF TENNESSEE & Others
vs.
GEO. K. WHITWORTH, Trustee, &c.

The plaintiffs demur to the answer, and for cause of demurrer say that said answer does not show sufficient cause why peremptory writ of mandamus should not issue as prayed for in the petition.

CHAMPION & HEAD,
WATSON & BAKER,
J. B. DANIEL,
Att'ys for Pl'ffs.

Joinder in Demurrer.

The defendant, by his attorney, comes and says that his said answer does show sufficient cause why a peremptory mandamus should not be issued, and why the petition should be dismissed.

ED. BAXTER,
Att'y for Def't.

Filed May, 1884. LEWIS T. BAXTER, *Clk.*

37 "EXHIBIT A."

Col. Ed. Baxter, Att'y-at-Law.

DEAR SIR: Mr. Thomas S. Marr, banker and broker, not remembering the past current prices of Nashville and Decatur R. R. stock, he referred me to the files of the Union and American, which reports it as follows. The first time it was quoted in that paper was March 10th, 1870, at 10 c'ts and 8 c'ts, there being very little sale for it:

March 18th, 1870, *@* 10 cts.
Dec. 30th, 1870, *@* 12 cts.
Dec. 30th, 1871, *@* 37 cts.
Dec. 30th, 1872, *@* 41 cts.
Dec. 30th, 1873, *@* 38 cts.
Dec. 30th, 1874, *@* 38 cts.
Dec. 30th, 1875, *@* 38 cts.
Dec. 31st, 1876, *@* 45 cts.
Dec. 28th, 1877, *@* 48 cts.
Dec. 26th, 1878, *@* 66 cts.
Dec. 25th, 1879, *@* 83 cts.
Dec. 30th, 1880, *@* 92 cts.
Dec. 30th, 1881, *@* 103 cts.
Dec. 30th, 1882, *@* 95 cts.
Oct. 26th, 1883, *@* 85 cts.

Filed May 22d, 1884.

LEWIS T. BAXTER,
Clk U. S. Cir. Court.

38 *Entries on Minutes.*

On the 4th day of August, 1884, the following proceedings were had in the United States circuit court for the middle district of Tennessee:

Present: Hon'l D. M. Key, U. S. judge, &c.

STATE OF TENNESSEE
vs
GEO. K. WHITWORTH, Tr, &c. } No. 2658 & 4 other cases.

These five cases were argued by counsel and taken under advisement by the court until the next term.

On October 22d, 1884, the following proceedings were had:

Present & presiding: Hon'l D. M. Key, judge, &c.

Mandamus.

STATE OF TENNESSEE
vs.
GEO. K. WHITWORTH, Tr., &c. } No. 2658.

This cause was heard at the last term of the court, and was argued by counsel and taken under advisement by the court; and the same coming on further to be heard this day as well as upon a former day of the term, the court was pleased to adjudge that the petitioner has no right to tax the shares of stock of the Nashville and Decatur Railroad Company for the reasons assigned in the opinion of the Hon'l Stanley Matthews, associate justice, filed in this cause, which opinion is hereby referred to and made a part of this judgment. And it is therefore ordered that the petition be dismissed and that the State of Tennessee and Davidson county, Tennessee, pay all the costs of this cause, each paying one-half thereof, for which let *fi. fa.* issue.

39

On the 29th day of December, 1884, the following proceedings were had, to wit:

STATE OF TENNESSEE
vs.
GEO. K. WHITWORTH, Trustee, &c. } No. 2658.

This cause having been revived against T. H. Sneed, trustee, the successor in office of Geo. K. Whitworth, was this day heard before the Hon'l Stanley Matthews and the Hon'l D. M. Key upon the demurrer to the answer and upon plaintiff's motion for a peremptory writ of mandamus as prayed for in the petition. And the court, being of the opinion that the defendant cannot lawfully assess for taxation the shares of stock in the Nashville and Decatur Railroad Company for the reasons that said shares are exempt from taxation by the terms of the charter, doth overrule the demurrer and deny the motion for a peremptory writ of mandamus; to which action of the court in overruling the demurrer and deny-

40

ing the motion for a peremptory writ the plaintiffs then and there excepted. And the plaintiff announcing by their counsel in open court that they elected to stand by their demurrer, the court doth adjudge that the petition be, and is hereby, dismissed at plaintiff's costs. The judgment entered at a former day of the term is set aside and for nothing held.

41 *Opinion of the Court.*

Mandamus.

MATTHEWS, *Justice*:

This is also a petition for a mandamus, filed in the circuit court of Davidson county and removed into this court on petition of the defendant, on the ground that its decision necessarily involves a question arising under the Constitution of the United States. All the questions in it are disposed of by the judgment in the previous case as to the exemption claimed on behalf of the stockholders in the Nashville, Chattanooga & St. Louis Railroad Company except one. That one is whether the stockholders in the Nashville & Decatur Railroad Company are entitled, under the charter of that company, to a like exemption.

On January 23, 1852, the General Assembly of Tennessee incorporated the Tennessee & Alabama Railroad Company for the purpose of constructing a railroad from Nashville through Franklin to the State line between Tennessee and Alabama in the direction of Florence, Alabama, and provided that "said company shall have
42 all the rights, powers, and privileges, and be subject to all the liabilities and restrictions, conferred and imposed upon the charter of the Nashville & Chattanooga Railroad Company and all the various amendments" thereto.

On Nov. 30th, 1853, the General Assembly of Tennessee incorporated the Central Southern Railroad Company for the purpose of building a railroad from the Tennessee and Alabama railroad, at Columbia, to the Alabama line, in the direction of Athens and Decatur, in Alabama. This act contains the same reference to the charter of the Nashville & Chattanooga Railroad Company as that contained in the act incorporating the Tennessee & Alabama Railroad Company just quoted. On Dec. 19th, 1853, the Legislature of Alabama incorporated the Tennessee and Alabama Central Railroad Company for the purpose of constructing a railroad from Montevallo through Decatur and Athens, Alabama, to the State line of Tennessee to connect with a railroad leading to Columbia, Tennessee, and with authority to consolidate with such company connecting with
43 its road at the State line. This consolidation was authorized and effected under an act of the Legislature of Tennessee, passed April 19th, 1866, the consolidated company to be called the Nashville and Decatur Railroad Company. The sixth section of the act is as follows:

"That the said Nashville and Decatur railroad shall, for its government, be entitled to all the rights and privileges, and subject to all the restrictions and liabilities, conferred and imposed upon the

Nashville and Chattanooga Railroad Company: Provided, That no State aid is intended to be extended to said Nashville and Decatur railroad: Provided, further, That no new liability is intended to be imposed hereby upon said Tennessee and Alabama Railroad Company and the Central Southern Railroad Company."

Under this act the consolidation was consummated by a surrender of all the original stock in the constituent companies, and the issue to the holders of equal amounts of stock in the new company; and the consolidation was ratified by an additional act of legislation. The question is whether the sixth section of the act of April 19th, 1866, which is the charter of the consolidated company, has
44 conferred upon the Nashville and Decatur Railroad Company, among the rights and privileges to which it is entitled for its government, the perpetual exemption of its capital stock from taxation, which was secured in the charter of the Nashville & Chattanooga Railroad Company to its capital stock.

It is claimed for the State, in the first place, that the word "privileges," used in this section, does not include the immunity from taxation possessed by the Nashville & Chattanooga Railroad Company, the term not having a meaning sufficiently broad to effect that object. But the contrary interpretation of that word, in the same connection as that now considered, has prevailed in a series of deliberate and careful judgments of the Supreme Court of the United States. Phil. & W. R. Co. *v.* Maryland, 10 How., 376; Tomlinson *v.* Branch, 15 Wall., 460; Chesapeake & O. R. Co. *v.* Virginia, 94 U. S., 718; Southwestern R. Co. *v.* Georgia, 92 U. S., 676; Central R. R. & Banking Co. *v.* Georgia, 92 U. S., 665; Humphrey *v.* Pegues, 16 Wall., 244; Railroad Co. *v.* Georgia, 98 U. S., 360. There
45 is nothing inconsistent with this view in the cases of Morgan *v.* Louisiana, 93 U. S., 217; Railroad Co's *v.* Gaines, 97 U. S., 711; Wilson *v.* Gaines, 103 U. S., 417; Railroad Co. *v.* Commissioners, 103 U. S., 4; Louisville & N. R. Co. *v.* Palmes, 109 U. S., 252; S. C. 3, Sup. Ct. Rep., 193.

In the case of Morgan *v.* Louisiana, 93 U. S., 217, the point decided was that immunity from taxation did not pass by the sale of the franchises of one company to another, because the latter only included such rights and privileges as were necessary to — operation of the company. In the other cases, particularly Railroad Co's *v.* Gaines, 97 U. S., 697, and Railroad Co. *v.* Commissioners, 103 U. S., 4, it was held that the grant to one company of the rights and privileges of another for the purpose of making and using a railroad carried with it not all the rights and privileges of the former, but only such as were necessary to accomplish the purpose to which the grant was limited—that of making and using a railroad

It is sought to bring the present case within the application of this principle of limitation by force of the words in the sixth
46 section of the act of 1866, which declare that the Nashville & Decatur Railroad Company "shall, for its government, be entitled to all the rights and privileges, and subject to all the restrictions and liabilities, conferred and imposed upon the Nashville

& Chattanooga Railroad Company." It is argued that this limits the grant to such rights and privileges only as are necessary for the government of the corporation, and that this excludes the privilege of being exempt from taxation as to its capital stock and property. But the words "for its government" are not words of limitation. The government of the corporation embraces every part of the conduct and business of the company, in all its relations to the State, to the general public, to individuals, to its own stockholders.

The language of the sixth section is precisely equivalent to a declaration that the Nashville & Decatur Railroad Company shall be governed by the charter of the Nashville & Chattanooga Railroad Company, as though it had been re-enacted as such with the name of the former inserted instead of the latter, repeating in detail
47 the language of each section, granting rights and privileges and imposing restrictions and liabilities. The charter of the corporation is the law of its government, which consists in the regulation of its business in all its relations and necessarily includes its rights, privileges, and obligations in respect to the State.

It may be said that the exemption from taxation of the shares of capital stock held as property by individual stockholders is not a corporate interest or privilege. But the charter, as was said in the previous case, is a contract with the individual corporators, and the exemption from taxation of its capital stock must be presumed to have been one of the important if not essential conditions and inducements to the formation of the corporation; the general interest of all the stockholders in the corporate property and business must be regarded as a corporate interest, and the privilege secured to the stockholder to be exempt from taxation on his shares in the capital stock is also a privilege of the company, inasmuch as it is thus enabled to obtain more readily subscribers to its stock,
48 and thus more certainly to insure the success of the corporation.

The supreme court of Tennessee, in the case of Wilson *v.* Gaines, 9 Baxt., 546, have taxen a different view from that announced in this opinion, and decided that the word "privilege" would not carry with it such an immunity from taxation; but the grounds of that decision do not seem to be sufficiently strong to outweigh the opposing judgments of the Supreme Court of the United States referred to above, and which in a question of this nature this court is bound to follow. It results from these views that judgment must be entered for the defendant dismissing the petition.

49 Circuit Court of the United States for the Middle District of Tennessee.

STATE OF TENNESSEE

vs.

THOS. H. SNEED, Successor in Office of Geo. K. Whitworth, Trustee of Davidson County, Tennessee.

Know all men by these presents that we, J. W. Allen and Leon Trousdale, Jr., of the county of Davidson and State of Tennessee,

are held and firmly bound unto the said T. H. Sneed, trustee, in the sum of $500, to be paid to the said Sneed, trustee, or his successors in office.

Witness our hands, this 28 day of July, 1885.

Whereas lately, at a term of the United States circuit court for the middle district of Tennessee, in a suit depending in said court between the State of Tennessee and others, as plaintiffs, and Thos. H. Sneed, successor in office of Geo. K. Whitworth, trustee of Davidson county, Tennessee, as defendant, judgment was rendered against the said plaintiff directing the dismissal of said petition and in favor of said defendant for the costs of this suit, and the said
50 plaintiff having obtained a writ of error to remove said cause to the Supreme Court of the United States and filed a transcript of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States to remove the judgment in the aforesaid cause:

Now, therefore, the condition of this obligation is such that if the said State of Tennessee, Davidson county, and city of Nashville shall prosecute said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void; else to remain in full force and effect.

[Seal Circuit Court U. S., Middle District Tenn.]

J. W. ALLEN.
LEON TROUSDALE, JR.

Approved.

D. M. KEY,
U. S. Dist. Judge.

Personally appeared before me, N. Baxter, clerk of the supreme court, the undersigned, J. W. Allen and Leon Trousdale, Jr., and made oath that they and each of them are worth the amount of said bond.

J. W. ALLEN.
LEON TROUSDALE, JR.

51 Sworn to & subscribed before me, this July 28th, 1885.

NATHANIEL BAXTER,
Cl'k S. C. Tenn.

52 UNITED STATES OF AMERICA, *Middle District of Tennessee:*

I, Lewis T. Baxter, clerk of the circuit court of the United States for the middle district of Tennessee, do hereby certify that the foregoing is a full and complete transcript of the record and proceedings in the case of the State of Tennessee *versus* Geo. K. Whitworth, trustee, &c., as the same now remain of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Nashville, in said district, this, the 28th

day of July, A. D. 1885, and of the Independence of the United States the 110 year.

[Seal Circuit Court U. S., Middle District Tenn.]

LEWIS T. BAXTER, *Clk*,
By CHAS. NASH, *D. Clk*.

$55.90 costs, including cost of transcript, paid by P. P. Pickard, comptroller, &c.

LEWIS T. BAXTER, *Clk*,
By CHAS. NASH, *D. C.*

53 The United States of America to George K. Whitworth, trustee of Davidson county, Tennessee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the middle district of Tennessee, wherein the State of Tennessee is plaintiff in error and George K. Whitworth, trustee, is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. D. M. Key, district judge of the United
54 States for the middle district of Tennessee, at the city of Nashville, in said district, this the — day of ——, 188—, and of the Independence of the United States the 109th year.

D. M. KEY, *Judge*.

I accept service of the above citation, this the 29- day of December, 1884.

ED. BAXTER,
Of Counsel and Attorney for the Defendant.

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the middle district of Tennessee, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the middle district of Tennessee before you, between the State of Tennessee, plaintiff, and George K. Whitworth, trustee, defendant, a manifest error hath happened to the great damage of the said State of Tennessee, as by the complaint appears, and it being fit that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send
56 the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second

Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this the 29th day of December, A. D. 1884, and of the Independence of the United States the 109th year.

LEWIS T. BAXTER,
Clerk U. S. Circuit Court, Middle District of Tennessee.

Endorsed on cover: M. Tennessee, C. C. U. S. No. 934. The State of Tennessee, plaintiff in error, *vs.* George K. Whitworth, trustee of Davidson county, Tennessee. Filed September 10, 1885.

117-129+139

UNITED STATES SUPREME COURT.

OCTOBER TERM. 1885.

No. 934.

State of Tennessee et als., Pl'tiffs in Error,

VS.

George K. Whitworth, Trustee of Davidson County, Defendant in Error.

S. A. CHAMPION.
JAS. M. HEAD.
Attorneys for the State.

A. D. TAVEL, STATIONER AND PRINTER, NASHVILLE.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1885.

No. 934.

STATE OF TENNESSEE AND DAVIDSON COUNTY, PLAINTIFFS IN ERROR.

vs.

GEORGE K. WHITWORTH, TRUSTEE, ETC.

STATEMENT.

The State of Tennessee and County of Davidson filed their petition in the Circuit Court of Davidson County for writs of mandamus to compel the Defendant, who was then the Trustee and Tax Collector for Davidson County, to assess and collect the taxes upon all the shares of stock in the Nashville & Decatur Railroad Company, and especially upon such as were then held and owned by certain parties named in the petition, all of whom were citizens and residents of Davidson County, Tennessee.

The Trustee refused to make the assessment and filed his petition for the removal of this cause to the Circuit Court of the United States for the Middle District of Tennessee, where it was tried and the petition of Plaintiffs for the writ of mandamus dismissed with costs, and they have appealed in error to this Court.

The Plaintiffs insist that by virtue of the Acts of the General Assembly of Tennessee, passed March 1, 1869, March 7, 1879, March 26, 1883, and April 4, 1885; it became the duty of said Trustee to assess for taxation and collect the taxes upon all the shares of stock in this corporation, to be assessed as the property of the holders as shown by the books of the corporation at the time of filing this petition, and to assess the same for taxes for three years next preceding the date of the assessment; provided the stock had been continuously held by the same owner for that length of time.

It is also insisted that these taxes when assessed would become a lien upon the stock, as provided by the 12th section of the Acts of 1869 and 1885, and for the payment of which the corporation is liable to the extent of any dividends declared since the filing of this petition as provided by the 13th section of this Act.

But where the stock has changed hands during the years for which it was liable to taxation, and before the filing of this petition, the Plaintiffs do not insist upon having it assessed now for then, nor do they seek to hold either the stock or the present owner liable for the taxes which should have been paid by a previous owner.

So much of the Acts of the General Assembly of Tennessee as are above referred to, and are material to this issue, are as follows:

On the 1st day of March, 1869, the Legislature of Tennessee passed an Act (see Acts of 1868–9, p. 68), the 9th, 11th, 12th and 13th sections of which are as follows:

SEC. 9. "*Be it further enacted*, That no tax shall hereafter be assessed upon the capital of any bank or banking association, or any other joint stock company organized under the authority of this State, or of the United States; but the stockholders in such banks and banking associations, or other corporations, shall be assessed and taxed upon the value of their shares of stock therein; said shares

shall be included in the valuation of the personal property of such stockholder, in the assessment of State, County and Municipal tax at the place, town, ward or district where such bank or banking association, or other corporation is located, and not elsewhere, whether the said stockholder reside in said place, town, ward or district, or not, but not at a greater rate than is assessed upon other monied capital in the hands of individuals in the State. *And provided further*, That nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by any such bank or banking association or other corporation; but the same shall be subject to State, County, Municipal and other taxation, to the same extent and rate, and in the same manner as other real estate is taxed."

"SEC. 11. *Be it further enacted*, That there shall be kept at all times in the office where the business of such bank or banking association organized under the authority of this State or the United States, shall be transacted, a full and correct list of names and residences of all the stockholders therein; and of the number of shares held by each; and such lists shall be subject to the inspection of the officers authorized to assess taxes during the business hours of each day on which business may be legally transacted.

"SEC. 12. *Be it further enacted*, That when the owner of stock in any bank or banking association organized under the laws of this State or of the United States, shall not reside in the same place where the bank or banking association is located; the revenue collector for the State, County, or corporation shall respectively have the same powers as to collecting the tax so assessed by this Act as they have by statute when the person assessed has removed from the town, city, ward or district in which the assessment was made; and the revenue collector, receiver of taxes, or other officer authorized to receive said tax from the collector, may all or either of them have an action to collect the tax from the avails of the sale of his shares of stock; and the tax on the share or shares of said stock shall be, and remain a lien thereon till the payment of said tax."

"13. *Be it further enacted*, That for the purpose of collecting such taxes, and in addition to any other laws of this State not in conflict with the Constitution of the United States relative to the imposition of taxes, it shall be the duty of any such bank or banking association, and the managing officer or officers thereof, to retain so much of any dividend or dividends belonging to such stockholders as shall be necessary to pay any taxes assessed in pursuance of said Act until it shall be made to appear that such taxes have been paid."

The remaining portions of this Act relate to other subjects of taxation not material in this case.

The above statute has been in full force in the State of Tennessee from the date of its passage to the present time, except as it may be modified, by the assessment Act of 1885, and under it banks, banking associations, insurance companies, gas companies, and many other corporations organized under the authority of this and the United States, have regularly been assessed, and paid their State, County and Municipal taxes as therein provided. But the railroad corporations organized under the authority of this State, and having their principal place of business within the State, have never paid any taxes whatever under the provisions of the above law.

And the assessment law of 1885 modifying this Act is as follows:

SEC. 8. *Be it further enacted*, That no tax shall hereafter be assessed upon the capital of any bank, or banking association, or any other joint stock company or corporation organized under the authority of this State, or the United States; but the stockholders and bondholders in such bank, or banking association, or other corporation, shall be assessed and taxed on the value of their shares of stock and bonds therein; said shares of stock and bonds shall be included in the valuation of personal property of such stockholder or bondholder in the assessment of State, county or municipal taxes, at the place, town, ward, or district where such bank, or banking association, or other corporation is located, (except otherwise provided by law), whether said stock-

holder or bondholder resides in said place, town, ward, or district, or not; and all banks or banking associations, or other corporations shall, in addition, be liable for taxes on any property, funds or assets owned by them not included in the foregoing provisions of this section; *Provided*, That the property and shares of stock in companies organized under the laws of the State of Tennessee, and engaged in manufacturing articles of the produce of this State shall be assessed as one property, in the same manner as the property of firms and individuals is assessed.

SEC. 9. *Be it further enacted*, That the President, or business manager, of any bank, banking association, or other corporation, doing business under the laws of this State, is hereby required to declare upon oath, before the Assessor, the amount of capital invested in such business, and the amount of bonded indebtedness, if any, outstanding against the same, and each one hundred dollars of such capital and bonded indebtedness, for the purpose of this Act and for the purpose of taxation, shall be held and regarded as one individual share in such bank, banking association, or other corporation, and such shares are hereby declared to be personal property. If such president or business manager have partners, he shall declare upon oath, before the Assessor, the number of shares held or owned by each of them in such business, ascertained as above provided, and the shares so held by any partner shall be included in the valuation of his taxable property in the assessment of all taxes levied in the city, town, ward, or civil district, where such business is located, except herein otherwise provided; and said president, or business manager, shall pay the same, and make the amount so paid a charge in his account with said partners; and if said President, or Business Manager, have no partners, he shall be held to be the sole owner of all the shares in said business, and the same shall be included in the valuation of his personal property in the assessment of all taxes levied in the city, town, ward or district where said business is located, except herein otherwise provided.

SEC. 10. *Be it further enacted*, That there shall be kept at all times in the office where the business of such bank, banking as-

sociation, or other corporation, organized under the authority of this State, or of the United States, shall be transacted, a full and correct list of the names and residences of all the stockholders and bondholders therein, and the number of shares and amount of bonds held by each, and such list shall be subject to the inspection of the officers authorized to assess taxes, during the business hours of each day on which business may be legally transacted.

SEC. 11. *Be it further enacted*, That when the owner of stock or bonds in any bank, or banking association, or other corporation organized under the laws of this State, or of the United States, shall not reside in the same county where the bank or corporation is located, or is a non-resident of the State, the Revenue Collector for the State, county or municipality, shall respectively have the power to collect the tax assessed by this Act, by instituting attachment proceedings, and said tax shall be and remain a lien on the stocks or bonds until the payment of the same.

SEC. 12. *Be it further enacted*, That for the purpose of collecting such taxes, and in addition to any other laws of this State relative to the imposition and collection of taxes, it shall be the duty of the President or managing officer of every such bank, or other corporation, doing business in this State, to retain so much of any dividend or interest belonging to such stockholder or bondholder as may be necessary to pay any and all taxes assessed in pursuance of this Act, until it shall be made to appear to such officers that said taxes have been paid."

On March 7, 1879, (See Acts 1879, p. 93), an Act was passed "For the more rigid collection of the revenue," the first section of which was so amended by the Act of 1883, (See Acts 1883, p. 255), as to make the Act read as follows:

SECTION 1. That all collectors of taxes are hereby made assessors, to assess all property which by mistake of law or facts has not been assessed, whether the omission be for the particular year for which the collector is acting or for any previous year or years, and it is hereby made the duty of such collectors, in all cases where property

has not been assessed, but on which taxes ought to be paid by law, to immediately assess the same and proceed to collect the taxes, and such collectors are hereby authorized to assess and collect taxes upon property for all the years for which taxes ought to have been paid upon such property, but have not been paid in consequence of the errors or omissions of former collectors or assessors; and if the owner of the property admits the liability of the property to taxation but disputes the assessment he may have a revaluation before the Judge or Chairman of the County Court at any time within one month, and in such case the Judge or Chairman aforesaid may hear proof and fix the assessment or valuation, and the same shall be final.

SEC. 2. Be it further enacted, That in case the owner of the property denies the right of the State county, city or town, to tax his property, and claims that it is exempt by virtue of the Constitution or any law or ordinance, but raises no question as to the amount or value fixed in assessing the property, then such collector shall submit the facts to the Comptroller as to the State tax, to the Judge or Chairman of the County Court as to the county tax, and to the Mayor of the city or town as to the municipal corporation taxes, and if by these several officers or any one of them he is directed to proceed to the collection of the taxes, he shall immediately and without any delay obtain from any Justice of the Peace of his county, a warrant or warrants for said taxes which shall be served on the owner of said property, and set for trial before some Justice of the Peace in said county and the warrants may be for the State, county and municipal corporation taxes jointly or separately, and all Justices of the Peace are hereby given jurisdiction to try all such cases, no matter what the amount, and the same shall be tried without delay, with the right to appeal by either party to the Circuit Court, and the appeal shall go to the next succeeding term unless the court is in session to which the appeal is taken, and in that case the appeal shall be to the term being held and shall be entered and tried at that term.

SEC. 3. Be it further enacted, That in case the owner of the property disputes both the assessment as to amount and the right to tax his property, then he shall be allowed 10 days to have a re-assessment before the Judge or Chairman of the County Court, and at the end of the 10 days the tax collector shall proceed as under the second Section.

And this was amended by the Act of 1885 as follows:

"SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That the Act of the General Assembly, being chapter 181 of the Acts of 1883 (Milliken & Vertrees' code, section 663, et seq.), be so amended as to add after the words "previous year or," and before the word 'year," in section 663, the word "three."

SEC. 2. Be it further enacted, That section 664 be so amended as to add thereto the words, "provided that no taxes on property for more than three years back shall be assessed and collected where they have not been assessed and not paid in consequence of the errors or omissions of former collectors or assessors."

SEC. 3. Be it further enacted, That this Act take effect from and after its passage, the public welfare requiring it."

Passed February 26, 1885.

ASSIGNMENT OF ERRORS.

The Court below erred in holding:

First. That the Nashville and Decatur Railroad Company was entitled to the immunities from taxation that had been conferred upon the Nashville and Chattanooga Company.

Second. That the exemption of the *capital stock* of a corporation from taxation, exempts the *shares of stock* in the hands of the individual shareholders.

Third. The Court erred in refusing the peremptory writ of mandamus directing the assessment of the shares of stock as prayed in the bill.

I.

The Constitution of this State requires that all property shall be taxed—taxed according to its value, in such manner as the Legislature may from time to time direct. Exemptions from taxation are contrary to public policy, and are never to be presumed.

Const. (Tenn.), Art. 2, sec. 28.
Wilson *vs.* Gaines, 9 Bax., 546.
S. C., 13 Otto, 417.
State *vs.* Whitworth, 8 Lea, 594.
Railroad Company *vs.* County of Hamblin, 12 Otto, 273.
Morgan *vs.* Louisiana, 93 U. S., 217.

II.

Whether or not the consolidation of two or more corporations shall operate as a dissolution of the old corporations, and the formation of a new one, is a question of legislative intent, to be determined from the act of consolidation and surrounding circumstances.

Shields *vs.* Ohio, 95 U. S., 319.
Tomlinson *vs.* Branch, 15 Wall., 460.
Railroad Company *vs.* Maine, 6 Otto, 499.
Railroad Company *vs.* Georgia, 92 U. S., 665.
Railroad Company *vs.* Georgia, 8 Otto, 359.

III.

The grant of the rights, powers and privileges of one railroad company which has an exemption from taxation, to another, "for its government," does not carry with it immunity from taxation.

Railroad Company *vs.* Gaines, 7 Otto, 697, 711.
Railroad Company *vs.* Commissioners, 103 U. S., 4.

IV.

The exemption of the capital stock of a corporation from taxa-

tion by the charter was never intended to exempt the shares of stock.

Union Bank *vs.* State, 9 Yerg., 489.
L. & N. R. R. Co. *vs.* State, 8 Heis., 663, 795.
Gas Co. *vs.* Nashville, 8 Lea, 406.
Memphis *vs.* Ensley, 6 Baxt., 553.
Memphis *vs.* Farrington, 8 Baxt., 539.
S. C., 5 Otto, 679.
Van Allen *vs.* Assessors, 3 Wall., 573.

V.

The Legislature has the power to separate the shares of stock in a corporation of its own creation from the person of their owner, and give them the same *situs* as that of the corporation for purposes of taxation.

Van Allen *vs.* Assessors, 3 Wall., 573.
Tappan *vs.* Merchants' Nat. Bank, 19 Wall., 490.
Delaware Railroad Tax Cases, 18 Wall., 206, 229.
Transportation Co. *vs.* Wheeling, 9 Otto, 273.
Railroad Co. *vs.* Collector, 100 U. S., 327.
Mayor of Nashville *vs.* Thomas, 5 Cold., 600.
Bedford *vs.* Mayor of Nashville, 7 Heis., 409.
O. & M. R. R. Co., *vs.* Wheeler, 1 Black, 286.
L. C. & C. R. R. Co. *vs.* Letnor, 2 How., 497.

VI.

When tax laws have proven invalid, or from any cause property has escaped taxation which should have been taxed, the defect may be cured by an act of the Legislature authorizing a reassessment.

Cooley on Taxation, 232.
Tillman *vs.* Janesville, 17 Wis., 71.
Cross *vs.* Milwaukee, 19 Wis., 509.
Delaware Div. Canal Co. *vs.* Commonwealth, 50 Penn., 399.
Otis *vs.* Boyd, 8 Lea, 679.
Wilson *vs.* Benton, 11 Lea, 51.

Collins *vs.* E. T., Va. & Ga. Railroad Co., 9 Heis., 841.
State *vs.* Railroad Co., 14 Lea, 56.

VII.

The assignment of the shares of stock in a corporation without notice to the company, simply conveys an equity and not the legal title, until the transfer is made upon the books of the corporation.

Insurance Co. *vs.* Sax, 2 Tenn. Ch., 507.
Clodfelter *vs.* Cox, 1 Sneed, 339.
Catron *vs.* Cross, 3 Heis., 584.
Spain *vs.* Hamilton, 1 Wall., 623.

VIII.

"The repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed."

Tenn. Code, sec. 49.

Therefore an assessment may be made now for then, and the taxes collected at the rate originally imposed.

Richardson *vs.* State, 3 Cold., 122.
Mayor *vs.* McKee, 2 Yer., 167.
Childress *vs.* Vance, 1 Baxt., 406-8.
State *vs.* Duncan, 3 Lea, 679.
Savings Bank *vs.* U. S., 19 Wall., 227.

The Act of the Legislature which authorized, and as plaintiffs insist, brought into being the "Nashville & Decatur Railroad Company" was passed by the Legislature of Tennesse, April 19, 1866, and is as follows:

SEC. 5. *Be it further enacted*, That for the purpose of uniting and consolidating the Tennessee and Alabama Railroad Company and the Central Southern Railroad Company into one, the Directors of said companies be, and they are hereby authorized to agree upon the terms thereof, and to adopt all necessary and

proper measures, agreements and obligations to effect the same; *provided*, said terms of consolidation, when perfected by the Directors of said companies, shall be submitted to a vote of the stockholders of said companies, and if assented to by a majority of the stockholders, the same shall be binding upon said companies, and that thereafter, and upon official report thereof to the President of the respective companies, and the Comptroller of the State, said consolidated and united companies shall be known and styled as the "Nashville and Decatur Railroad Company," by which name it shall sue and be sued, and be entitled to all the rights and privileges, and be subject to all the liabilities and restrictions of a body corporate.

SEC. 6. *Be it further enacted*, That the said Nashville and Decatur Railroad shall, for its government, be entitled to all the rights and privileges, and subject to all the restrictions and liabilities conferred and imposed upon the Nashville and Chattanooga Railroad Company; *Provided*, that no State aid is intended to be extended to said Nashville and Decatur Railroad; *Provided further*, that no new liability to the State of Tennessee is intended to be imposed hereby upon said Tennessee and Alabama Railroad Company and the Central Southern Railroad Company.

SEC. 7. *Be it further enacted*, That the Directors of said Tennessee and Alabama Railroad Company, in maturing the terms of consolidation hereinbefore provided, may adopt such by-laws, rules and regulations, not inconsistent with the laws of Tennessee, and the United States, as may be necessary and proper to the successful operation and management of said consolidated company, and may provide in said terms for the discharge of their respective indebtedness, so as to bind said consolidated company therefor; *Provided*, that nothing in this Act shall be construed to alter or affect the lien of the State of Tennessee for aid heretofore extended to said companies, but the same shall be extended and held as a liability against said consolidated company.

SEC. 8. *Be it further enacted*, That an election shall be held by the stockholders of the Tennessee and Alabama Railroad, and the Central Southern Railroad, jointly, on the first Monday in May

next, at the town of Pulaski, in Giles county, for Directors for said roads thus combined, who shall be elected in the same manner as is now provided for the Tennessee and Alabama Railroad in its charter, and shall hold their office for one year, and until their successors are elected and qualified.

SEC. 9. *Be it further enacted*, That the Tennessee and Alabama Railroad and the Central Southern Railroad, thus consolidated, may, through their Directors thus elected, be consolidated with the Alabama and Tennessee Central Railroad, upon such terms as may be agreed upon between them, and approved by the stockholders of said roads, to be thereafter known as the Nashville and Decatur Railroad; such terms not to be in conflict in anywise with those herein contained, but may be supplemental or in addition thereto; *Provided*, the consolidation herein provided for be approved by Act of the Legislature of the State of Alabama, heretofore or hereafter passed, and said railroad, thus consolidated, may, by their stockholders, regularly convened, upon thirty days' notice in the newspapers of Nashville and Huntsville, elect Directors to serve them for the term of twelve months, and until their successors shall be elected.

SEC. 10. *Be it further enacted*, That the capital stock of said united companies shall be the aggregate amount of their respective charters, with the addition thereto of ——— dollars; and that this Act shall take effect from and after its passage. [See Acts of 1865–6, pp. 219, 220.]

The consolidation provided for by said statute was approved by an Act of the Legislature of Alabama. The terms of the consolidation were by appropriate action referred to an executive committee, which committee embodied their suggestions in the form of a resolution, which was as follows: "Resolved, That under the authority delegated to the executive committee by the respective stockholders of the Tennessee and Alabama, Central Southern, and Tennessee and Alabama *Central* Railroad Companies, the committee have agreed that the capital stock of each company shall represent the value of its road, and that therefore each of the companies herein mentioned, shall surrender to the Nashville & Decatur Railroad Company, all of its rights, fran-

chises, and property; the Nashville & Decatur Railroad Company assuming to pay all debts owing by the several companies, and being hereby especially pledged to protect all persons who have made themselves individually liable for the debts of any of the several companies, and that the stockholders of each company shall be entitled to and receive credit for the same amount of stock in the Nashville & Decatur Railroad Company that they own in any of the several companies; these constituting and comprising the whole basis of settlement."

On November 21, 1866, at a convention of stockholders of the Tennessee and Alabama, the Central Southern, and the Alabama and Tennessee *Central* Railroad Companies, the resolution aforesaid was unanimously confirmed by the convention, and the three roads were "declared to be united and consolidated under the style of the Nashville & Decatur Railroad."

On March 8, 1867, the General Assembly of the State of Tennessee passed an Act, the first section of which is as follows: "That the consolidation aforesaid be and the same is hereby as fully confirmed in all respects as if the convention had been held on the first Monday of May, 1866, and that the said consolidation and all acts of said convention be and the same are hereby declared valid."

The capital stock of the Nashville & Decatur Railroad Company, as directed by the Acts authorizing and ratifying the consolidation is made up of the aggregate of the capital stock of the three original companies. The stockholders in those companies surrendered their original certificates and received as the representatives thereof certificates for equivalent amounts of stock in the Nashville & Decatur Railroad Company.

The 38th section of the charter of the Nashville and Chattanooga Railroad Company, which is relied upon as furnishing the exemption from taxation claimed under the 6th section of the charter of the Nashville & Decatur Railroad Company, is as follows: "That the capital stock of said company shall be forever exempt from taxation, and the road with all its fixtures and appurtenances, including work-shops, ware-rooms and vehicles of

transportation, shall be exempt from taxation for a period of twenty years from the completion of the road and no longer."

The first question presented for our consideration then, is, Has the Nashville & Decatur Railroad Company or its stock, any exemption or immunity whatever from taxation; if so, for how long, and to what does it apply?

It is submitted, that the Act of April 19, 1866, which authorized the consolidation of the three railroad companies which when united became the Nashville & Decatur Railroad Company shows conclusively that it was the intention of the Legislature, that a new corporation should be created by virtue of that Act, and that the old corporations should pass out of existence. In the first place it was provided that the means of consolidation when agreed upon by the directors of the old companies should be submitted to a vote of the stockholders, and that if assented to by a majority, "the same shall be binding upon said companies and that thereafter, and upon official notice to the Presidents of the respective companies and the Comptroller of the State, said consolidated and united companies shall be known and styled "Nashville & Decatur Railroad Company, by which name it shall sue and be sued and be entitled to all the rights and privileges and be subject to all the liabilities and restrictions of a body corporate."

By the 7th section the Directors of the old companies in maturing the terms of consolidation were empowered "to adopt such by-laws, rules and regulations as were necessary and proper to the successful operation and management of said consolidated company, and may provide in said terms for the discharge of *their* respective indebtedness, so as to bind *said consolidated company therefor.*"

The 8th section authorized a joint meeting of the stockholders of the two Tennessee corporations thus authorized to be consolidated for the purpose of electing directors for the consolidated company.

The 9th section provided that the two Tennessee corporations

thus consolidated, "may, through their directors thus elected," be consolidated with the Alabama corporation upon such terms as may be agreed upon between them and approved by the stockholders of said roads to be thereafter known as the "Nashville & Decatur Railroad," but not to be in conflict with the former consolidation and to be approved by the Legislature of Alabama.

But the resolution, which was unanimously adopted at the meeting of the stockholders of the three companies, and which was approved by the Legislatures of both States as comprising the whole basis of settlement, shows even more clearly the real nature, purpose, and intent, of the Act of consolidation. It provides: That the capital stock of each company shall represent the value of its road, and that therefore each of the companies herein mentioned, shall surrender to the Nashville & Decatur Railroad Company, all of its rights, franchises and property; the Nashville & Decatur Railroad Company assuming to pay all debts owing by the several companies, and being hereby especially pledged to protect all persons who have made themselves individually liable for the debts of any of the several companies, and that the stockholders of each company shall be entitled to and receive credit for the same amount of stock in the Nashville & Decatur Railroad Company that they own in any of the several companies: these constituting and comprising the whole basis of settlement."

That this was intended, and did work, a dissolution of the old corporations and the creation of a new one there can be no doubt. Railroad Co. *vs.* Ga., 92 U. S., 665; Railroad Co. *vs.* Georgia, 98 U. S., 359.

If then the old Tennessee and Alabama, and Central Southern Alabama and Tennessee Central Railroads went out of existence when their stocks were consolidated under the Act of April 19, 1866, "their powers, their rights, their franchises, privileges and immunities ceased with them, and they have no existence except by virtue of the grant of corporate powers and privileges made by the consolidation Act of 1866." 98 U. S., 364.

The only exemption or immunity from taxation of any kind that is even alluded to in this charter is in the 6th section which provides: "That the said Nashville & Decatur Railroad, *shall for its government* be entitled to all the rights and privileges, and subject to all the restrictions and liabilities conferred and imposed upon the Nashville & Chattanooga Railroad Company."

It is submitted that under the decisions of the Supreme Court of Tennessee, in construing the meaning of the terms "rights" and "privileges," as used in the Constitution of that State, they are wholly insufficient to pass any immunity or exemption from taxation whatever. Wilson *vs.* Gaines, 9 Bax., 546. And this honorable Court has repeatedly and uniformly held that where an immunity from taxation had been granted to a given corporation and for any cause this corporation was dissolved this immunity died with it, notwithstanding the Act of the Legislature which authorized the sale or dissolution of the old corporation expressly provided that the purchaser should succeed to all such franchises, rights, and privileges as were enjoyed by the first company. And the reasons for considering an exemption from taxation, as a personal privilege pertaining to the corporation receiving it, and not inhering in the property and passing to an assignee, are fully set out in Morgan *vs.* Louisiana, 93 U. S., 217; L. & N. R. R. Co. *vs.* Palmes, 109 U. S., 244, and Chesapeake & Ohio Ry. Co. *vs.* Miller, 114 U. S., 176.

This Court has uniformly adopted the rule, not only that an exemption from taxation is a personal privilege, but also that it is a privilege of such a character that the intention to grant it must be clear, and beyond question. In every instance where this exemption is not granted in direct and unmistakable terms, and without qualification, the exemption has been held not to exist. The grant in the charter of the Nashville & Decatur Railroad is not of an exemption from taxation absolutely, nor of the rights and privileges of the Nashville and Chattanooga Railroad, absolutely, but such of these rights and privileges as are necessary "*for its government.*" Certainly it cannot be insisted that an exemption from taxation was necessary, or was intended to be passed as a part of the rights and privileges of

the Chattanooga road which were conferred upon the Decatur road "for its government." As absolutely conclusive of this question we refer to the cases of Railroad Co. *vs.* Gaines, 97 U. S., 697–711; Railroad Co. *vs.* Commissioners, 103 U. S., 4. In the former case the grant was "of all the rights and privileges" of the Nashville & Chattanooga Company "for the purpose of making and using the road"; and in the latter case the grant was of "all the powers and privileges," of the Baltimore and Ohio charter "necessary to the construction and repair" of its road, and in each case this Court held that an immunity from taxation did not pass, and quoted with approval the language of Justice Field in Morgan *vs.* Louisiana, where he said that "the grant to one company of the rights and privileges of another for the purpose of making and using a railroad carried with it, only such rights and privileges as were essential to the operation of the company, and without which the road could not be successfully worked."

The reasoning of the Court being that no intendment shall be made in favor of exemptions, and that as the road could be successfully operated without it, the exemption did not pass. And if an immunity from taxation is not necessarily included in the privileges exercised "in the making and using a road" which certainly embraces everything, it is difficult to see how or why it is necessarily embraced in the privileges conferred "for its government." Certainly the privileges "for the government" of the company, can embrace no more, than is requisite "for making and using the road," and as immunity from taxation is not essential to the latter, it cannot be to the former, and therefore did not pass under the 6th section of the charter of the Nashville & Decatur Company.

The question, then, of charter exemptions out of the way, the liability of the shares of stock to taxation being established, we come now to consider some of the objections urged more against the form of proceeding, or the sufficiency of existing laws to subject this character of property to taxation, than to its liability in the first instance.

It is first objected that the shares held by non-residents of this

State cannot be taxed. Before considering the power of the State to subject to taxation the shares of stock held by non-residents in corporations of her own creation, it may be well for us to examine the statutes of the State upon this subject, and see what has been attempted in this direction. As early as 1836 the shares of stock in the Bank of Tennessee were subjected to the payment of taxes. Since that time we have always had laws upon the statute books providing for the assessment and taxation of the shares of stock in all joint stock companies or corporations organized under the laws of this State. And under these laws as then enforced an effort was made in 1868 to tax the shares of stock in a national bank chartered by Congress and doing business in Nashville. Our Supreme Court held, in Mayor of Nashville *vs.* Thomas, 5 Cold., 600, that "the law of this State is, that stocks in banks and other corporations are taxable at the place of the owner; where he is an inhabitant of this State * * nothing here said is to be understood as implying that shares of stock owned by residents or non-residents, may not be made by legislative enactment, taxable at the place of the corporation of which it is an incident," thus recognizing the fact that up to this time no effort had been made by the Legislature to give the shares of stock in her corporations a *situs* different from that of their owner. But as the act of Congress which chartered these banks authorized the States to provide when and where they should be taxed, and as the Legislature of this State had passed no law providing for their taxation as required, the shares of stock were not then taxable in the manner attempted. Thereupon the Act of 1869 was passed, which has ever since remained the law of this State, subject to some modifications and amendments.

The provisions of this Act have repeatedly been held by our Courts to extend to every joint stock company or corporation organized under the laws of this State, and the shareholders in gas companies, insurance companies, and other corporations, have been required to pay taxes accordingly, whether residents or non-residents, notwithstanding the fact that the corporations had already been taxed upon the corporate property in which the capital stock had been invested.

In Bedford *vs.* Mayor of Nashville, 7 Heis., 409, the Court says: "The plaintiff is the owner of stock in the Nashville Gas Light Company, a corporation organized for the purpose of supplying the city of Nashville with gas, having its office and place of business within the corporate limits of said city.

"A tax was assessed by the city authorities for municipal purposes upon the value of the plaintiff's said stock, and she resists its payment upon the ground that as she is a non-resident of the city of Nashville, her stock is not liable to this tax; that her stock is only liable for the taxes assessed in the county and district where she resides. We have just held in the case of McLaughlin *et als. vs.* Chadwell, tax collector, that previously to the Act of March 1, 1869, under the general law making personal property taxable in the county where the owner resided, and in the absence of any special legislation upon the question, stocks are taxable where the owner resides. We held, however, in those cases, in regard to stocks in the national banks, that the Act of March 1, 1869, changed the law upon the subject, and made the stock taxable in the city, town or ward where the bank was located, and that this Act, being within the express permission of the Act of Congress upon this subject, and not in violation of any provision of the Constitution, was valid. The question now is as to the effect of this Act upon stocks in corporations other than national banks or banking associations.

"The language of the ninth section of said Act, or so much thereof as is necessary to quote is: (Here the ninth section of the Act of March 1, 1869, given above, is quoted in full).

"It is argued with much ingenuity that this Act was only intended to apply to banks, banking associations, or other corporations dealing in money, or doing in some form a banking business. First, for the reason that the Act was passed in consequence of the decision in the case of The Mayor *vs.* Thomas, 5 Cold., 600, which made further legislation in relation to the tax upon national bank stock necessary; and second, because other sections of the Act, in relation to carrying out the provisions of the first, relate only to banks or banking associations; and from

these considerations it is argued that the Act was only intended to apply to banks or corporations doing a banking business. If the meaning of the statute from its language were ambiguous or doubtful, then the consideration urged would have great weight in enabling the court to determine the meaning; but here the language is plain and unambiguous and comprehensive. The language is: 'Any banking association or other joint stock company organized under the authority of this State or of the United States,' and this or equivalent language is used three times in the same section. Its meaning seems to be obvious and plain, and includes all stock in all corporations organized under State or Federal authority, and we cannot avoid this plain language upon the grounds urged. Then, had the Legislature the power to make this change? We held the law valid as to the national bank stocks, and the only difference between these stocks and the plaintiff's in the Gas Company, is that as to the bank stock, the act of Congress expressly leaves to the State Legislature the power to fix the place where the stock of its own citizens in the banks may be taxed. Still if the Act taxing the stock in the city where the bank is located, the owner living elsewhere, were in violation of any provision of the State Constitution, we think the law would be void, or rather it would have to conform to the State Constitution; but as we have held, there is no Constitutional prohibition."

"Of course we do not say that the Legislature would have the power to tax property, real or personal, in a county or city different from the place where the property is located; but it will be borne in mind that these stocks have in reality no locality; they are not located where the bank is situated, nor have they in reality a locality where the owner resides. It was held, in the absence of special legislation upon the subject, that they come under the general head of personal property, and as they had no locality, on account of the locality of the bank, that they must follow the residence of the owner; but as they had no actual locality at either place, the rule might be changed by legislation upon the subject. It would seem to result from this, that the plaintiff is made liable for a corporation tax for the support of

the government of the city of Nashville upon property not situated in the city, and for which, under previous well settled law, she was not liable. The change may be more apparent than real."

"Previously to the passage of this Act, the capital of this corporation was subject to taxation in its aggregrate and corporate capacity. Of course, of a tax thus assessed and paid, the plaintiff would have indirectly had to bear her proportion. Now, by this law, the capital of the corporation is exempt, and in its place the tax is divided among the stockholders. It would seem to be the same thing in a different shape. But be this as it may, the Legislature having in plain language expressed their intention upon the subject, we could not declare the law void, unless it were a plain violation of some provision of the Constitution, and this does not appear to be so."

"Affirm the judgment."

This decision was rendered February 7, 1872, as the unanimous opinion of the Court, has never since been controverted, but repeatedly recognized and reaffirmed by the Court, and acted upon by almost every corporation in the State, and the taxes paid by the corporation whenever any dividends are declared, whether the holder of the shares of stock be a resident or non-resident of the State.

This principle was also distinctly recognized by the Supreme Court of the United States in Tappan *vs.* Merchants' National Bank, 19 Wall., 490. We may therefore regard the doctrine as well established that the law making power which creates a corporation, has full power to separate the shares of stock from the person of their owner, and give them a *situs* of their own for the purposes of taxation: Delaware Railroad Tax Cases, 18 Wal., 206, 229; Van Allen *vs.* Assessors, 3 Wall., 573.

It is well established that the law making power has full authority to tax wherever it has jurisdiction of the property over which the Legislature, has control, and to which it extends its protection, irrespective of the residence of the owner: Railroad

Co., *vs.* Collector, 100 U. S., 575; U. S. *vs.* Erie Railroad Co., 106 U. S., 327.

And in Transportation Company *vs.* Wheeling, 9 Otto., 273, the court holds that "steamboats which ply between different ports on a navigable river may, under a State statute, be taxed as personal property by the city where the company owning them has its principal place of business."

It will hardly be controverted that the shares of stock in a Tennessee corporation which lays no claim to exemption, held by a resident of the State, are subject to taxation as personal property; nor can it be controverted that if the charter of the corporation had provided for the taxation of the shares of stock at the place of its principal office, that in that case, the non resident holders of its shares could be forced to pay the taxes assessed against them. The only question then is, as to the power of the Legislature creating a corporation, which has no clause in its charter providing for the taxation of its shares, afterwards by the enactment of a general law, to give its shares of stock the same *situs* as that of the corporation, and make them taxable accordingly.

The power of the Legislature to declare what species of property shall be personalty and what realty, has never been doubted. The Legislature of this State declared that the road bed, the land upon which a railroad is located, should be personal or distributable property, and taxed as such. The validity of this enactment was affirmed by our Supreme Court in the case of Railroad Company *vs.* W. B. Bate *et al.*, 12 Lea, 573. In fact, the power has never been doubted. The Legislature has created the corporation; it is a citizen of the State; it has its principal place of business within the State; it asks and receives the benefit and protection of the laws of the State; what legal objection then can be urged against the power of the Legislature to provide for the taxation of this species of personal property—which only exists by virtue of the legal entity which the State has created—at the place where the corporation has its principal office? We can readily understand how the objection could be urged before the law-making power against the policy of such a character

of legislation, but we utterly fail to appreciate the force of the argument when addressed to a court. No contract is violated, no obligation is impaired, no vested right of the citizen is infringed, and by the enactment of such a law notice is given to all the world, that if they are, or expect to become the owner of shares of stock in a Tennessee corporation, they do so with the distinct understanding that the tax which the State sees proper to levy shall be paid at the place where the corporation has its principal place of business. This may deter a non-resident from investing in the stock of Tennessee corporations, but that is an argument which can alone be addres-ed to the law-making power.

Congress provided that the shares of stock in national banks should be taxed where the bank was located and not elsewhere. It is true this was done in the Act which chartered the banks. But will it be pretended, that even if this provision had been left out of the charter, that Congress could not subsequently have provided by a separate Act for the same thing? It may be insisted that such a law would operate as a great hardship upon the owners of stock who had purchased it with a different understanding, and owned it at the time the Act was passed. So there are many laws which work great individual hardships, but this cannot affect their constitutionality.

But in the case at bar, there is no constitutional provision authorizing the exemption of this character of property, and the purchaser invests in it with full knowledge of the constitutional mandate which requires all property to be taxed—taxed according to its value, in such manner as the Legislature shall from time to time direct. The Supreme Court of this State, in Chattanooga *vs.* Railroad Company, 7 Lea, 561–76, expressly declared the Act of 1875 providing for the taxation of railroad property, unconstitutional, because it provided "that from the aggregate value of railroad property was to be deducted the real cash value of the individual shares." The Court saying: "The constitutional mandate that all property shall be taxed, prevents the Legislature from granting any exemption whatever, no matter what the consideration. The grant of the exemption is unconsti-

tutional and void." And the present Act of 1882, providing for assesstment and taxation of railroad property, expressly decclares that this deduction or exemption shall not be made.

In providing for the assessment and taxation of the shares of stocks in Tennessee corporations, even though owned by non-residents, the Legislature does not seek or attempt to legislate upon or control their actions, but does demand from certain property over which it has control, and which receives the benefit of its protection, a contribution for the protection afforded, no matter where its owner may reside. This principle is universally admitted as to real property, and all tangible personal property which has an actual *situs*, and certainly no valid objection can be urged against the application of the same rule to personal property which has no actual *situs* of its own, but over which the State has legislative control, it being merely an incident to the corporation created by the State.

The position assumed that the stock is based upon property which lies partly in another State, hence, not taxable in this, is wholly untenable. As we have before argued, the shares of stock do not represent either the exact amount originally invested, or the value of property actually on hand. It is rather a certificate representing the proportion or ratio in which the earnings of certain property shall be divided among its owners, which fixes its chief element of value, and ultimately the proportion in which the property itself shall be divided in the event the corporation should be dissolved. The value of this certificate which is sought to be taxed, depends not so much upon the property owned by the corporation, or where it is situated, as upon the business in which the property is invested, the manner in which it is controlled, and the nature of the franchise secured to the corporation by the State which created it. So that the mere fact of a small portion of the property owned by the corporation being out of the State, could exert but the least possible influence upon the value of the shares of stock, which is dependent almost exclusively for its value upon the other elements just named. In many corporations, for instance the telegraph, telephone, electric time clock, or a well established newspaper, and many others, the

actual property owned would scarcely pay one cent in the dollar upon the value of their shares of stock. The shares of stock then deriving their chief value from such elements as inhere in the corporation itself, it would be the grosest injustice to permit even a portion of the shares of stock to escape taxation in the State where the corporation is located, which secures to it all the protection it has, and upon which it is dependent for its very existence. The State has jurisdiction of the corporation and the shares of stock, and thereby has full power to force their owner to pay the taxes justly due.

It has certainly been regarded as well established law since the decision in the Ohio & Mississippi Railroad Co. *vs.* Wheeler, 1 Black, 286, that a corporation has no legal existence as such beyond the jurisdiction of the State which chartered it. It may do business in another State only to such an extent as the comity between the States may permit. And where a corporation is chartered by the same name, in two different States, with the same corporate powers, and is under the control of the same President and Board of Directors, it is still two separate and distinct corporations. But where it is chartered only by one State, and simply has a license to do business in another, it is strictly a corporation of the State which chartered it.

In L. C. & C. Railroad Co. *vs.* Letson, 2 How., 497, the court decides: "That where a corporation is created by the laws of a State, the legal presumtion is, that its members are citizens of the State in which alone the corporate body has a legal existence." This decision has been several times reaffirmed by this Court.

If, as is provided by the language of the 4th section of the charter of the Nashville & Chattanooga Company, "the said subscribers to the stock shall form a body politic and corporate, in deed and in law, by the name and for the purposes aforesaid," and "the legal presumption is, that its members are citizens of the State in which alone the corporate body has a legal existence," the power of the State to tax the property of its shareholders is established beyond controversy. This then is the distinction which the court intended to make when it denied the right of the

State of Pennsylvania to tax foreign held bonds. The holders of these bonds were in no sense of the word members of the corporation. Their bonds were admitted to be property subject to taxation, but of such a character as followed the person of their owner, over whom the State had no control, and to which it had no right to fix a *situs*. No such reasons apply to the holders of the shares of stock in a corporation. The right of the law-making power to give a *situs* to the shares of stock in corporations of her own creation is abundantly established; and coupled with "the legal presumption that its members are citizens of the State in which alone the corporate body has a legal existence," the Legislature has jurisdiction both of the person and the property for purposes of taxation. It is not insisted that the corporation whose shares of stock are sought to be taxed in the present proceedings, is not, strictly speaking, a Tennessee corporation, even though a portion of its property lies in other States.

As we conceive it to be established almost beyond controversy that no matter what exemptions may have been granted to the Nashville & Chattanooga Railroad Company, they did not pass to, nor were they granted to, the Nashville & Decatur Railroad. It is wholly unnessary for us to discuss in this connection to what the exemptiens, which were granted to the Nashville & Chattanooga Railroad, did apply.

And in view of the numerous and recent decisions which have been made by the Supreme Court of Tennessee in regard to the constitutionality of the acts of 1879 and 1883, under which the assessment in this case is asked to be made, it is unnecessary for us to discuss the various grounds upon which these Acts have been assailed. That court has repeatedly held that these Acts were not retrospective in their operation in such a sense as to render them obnoxious to the constitutional inhibition against such laws.

That the County Trustee or Tax Collector is the proper person to make such assessments for State and county purposes where from any cause property has escaped taxation, and that the as-

THE STATE OF TENNESSEE, PLAINTIFF IN ERROR,

VERSUS

GEO. K. WHITWORTH, TRUSTEE OF DAVIDSON COUNTY.

STATEMENT OF FACTS.

This suit was commenced in the Circuit Court of Davidson county, Tennessee, and was removed, upon defendant's petition, to the Circuit Court of the United States for the Middle District of Tennessee.

It is an application for a writ of *mandamus* to compel the defendant to assess for taxation the shares of stock in the Nashville and Decatur Railroad Company, held by individual stockholders.

The defendant filed a motion to dismiss, but without action thereon by the Court, filed his answer.

The plaintiff filed a demurrer to the answer and moved for a peremptory writ of *mandamus*.

The Court overruled the demurrer, and the plaintiff electing to stand by its demurrer, final judgment was rendered for the defendant.

The plaintiff brought the case to this Court by writ of error.

The facts before the Court, therefore, are contained in the petition and answer, and are as follows:

The defendant is a tax collector, and, as such, it is his duty to assess for taxation all property which, by mistake of law or fact, has been omitted from the assessment roll. This duty is imposed by the Act of March 7, 1879, which provides:

"That all collectors of taxes are hereby made assessors, to assess all property which by mistake of law or facts has not been assessed, and it

is hereby made the duty of such collectors, in all cases whereby property has not been assessed, but on which taxes ought to be paid by law, to immediately assess the same and to proceed to collect the taxes," etc.

This Act was amended by an Act passed March 28, 1883, ch. 181, which provides:

"That Section 1 of an Act passed March 7, 1879, entitled an Act: "For the more rigid collection of the revenue," be so amended as to read as follows: "That all collectors of taxes are hereby made assessors to assess all property which by mistake of law or fact has not been assessed, whether the omission be for the particular year or years, and it is hereby made the duty of such collectors, in all cases where property has not been assessed, but on which taxes ought to be paid by law, to immediately assess the same, and to proceed to collect the taxes."

This latter Act was amended by an Act passed February 26, 1885, which provides:

Sec. 1. "That the Act of the General Assembly, being ch. 181, of the Acts of 1883 (Milliken & Vertrees Code, Section 663, *et seq.*), be so amended as to add after the words, "previous year. or," and before the word "year," in Section 663, the word, "three."

Sec. 2. That Section 664 be so amended as to add thereto the words, "provided that no taxes on property, for more than three years back, shall be assessed and collected, where they have not been assessed, and not paid, in consequence of the errors or omissions of former collectors or assessors."

Under the laws of Tennessee, therefore, the defendant cannot assess this property back for a longer period than three years from the date of the assessment.

The shares of stock in this railroad company have never been assessed for, nor paid any taxes.

The Nashville and Decatur Railroad Company was formed in 1866 by the consolidation of three railroad companies, viz: The Central Southern, the Tennessee and Alabama, and the Tennessee and Alabama Central Railroad Companies. The two former were Tennessee corporations, their roads lying wholly within that State; the latter was an Alabama corporation, its road lying wholly within that State.

The Tennessee and Alabama Company was chartered on January 23, 1852, by the Legislature of Tennesse, and built its road from Nashville to Columbia, Tennessee.

The Central Southern Company was chartered by the said Legislature on November 30, 1853, and built its road from Columbia to the line between Tennessee and Alabama.

The Tennessee and Alabama Central Company was chartered by the Legislature of Alabama on December 19, 1853, and built its road from Decatur, Alabama, to the line between Tennessee and Alabama at a point where it joined the road of the Central Southern Company.

The roads of these three companies thus formed a continuous line from Nashville to Decatur, a distance of about one hundred and twenty-two miles. Passengers and baggage, however, had to change cars at the terminus of each road.

Section 1 of the charter of the Tennessee and Alabama Railroad Company provides "that said company shall have all the rights, powers and privileges, and be subject to all the liabilities and restrictions conferred and imposed upon the charter of the Nashville and Chattanooga Railroad Company, and of the various amendments thereto."

Section 15 of the charter of the Central Southern Railroad Company provides "that the said company shall have all the powers and privileges and be subject to all the restrictions and liabilities prescribed in the charter of the Nashville and Chattanooga Railroad Company, and in the various amendments thereto," etc.

Section 38 of the charter of the Nashville and Chattanooga Railroad Company is as follows:

"The capital stock of said company shall be forever exempt from taxation, and the road with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer."

The road of the Tennessee and Alabama Company was completed in 1859, and the road of the Central Southern Company in 1860.

On the 19th day of April, 1866, the Legislature of Tennessee passed an Act, providing as follows:

SEC. 5. *Be it further enacted*, That, for the purpose of uniting and consolidating the Tennessee and Alabama Railroad Company and the Central Southern Railroad Company into one, the Directors of said companies be, and they are hereby authorized to agree upon the terms thereof, and to adopt all necessary and proper measures, agreements and obligations to

effect the same; *provided*, Said terms of consolidation, when perfected by the Directors of said companies, shall be submitted to a vote of the stockholders of said companies, and if assented to by a majority of the stockholders, the same shall be binding upon said companies, and that thereafter, and upon official report thereof to the President of the respective companies, and the Comptroller of the State, said consolidated and united companies shall be known and styled the "Nashville and Decatur Railroad Company," by which name it shall sue and be sued, and be entitled to all the rights and privileges, and be subject to all the liabilities and restrictions of a body corporate.

SEC. 6. *Be it further enacted*, That the said Nashville and Decatur Railroad shall, for its government, be entitled to all the rights and privileges, and subject to all the restrictions and liabilities conferred and imposed upon the Nashville and Chattanooga Railroad Company; *provided*, That no State aid is intended to be extended to said Nashville and Decatur Railroad; *and provided further*, That no new liability to the State of Tennessee is intended to be imposed hereby upon said Tennessee and Alabama Railroad Company, and the Central Southern Railroad Company.

SEC. 7. *Be it further enacted*, That the Directors of said Tennessee and Alabama Railroad Company, in maturing the terms of consolidation hereinbefore provided, may adopt such by-laws, rules and regulations, not inconsistent with the laws of Tennessee and the United States as may be necessary and proper to the successful operation and management of said consolidated company, and may provide in said terms for the discharge of their respective indebtedness, so as to bind said consolidated company therefor; *provided*, That nothing in this Act shall be construed to alter or affect the lien of the State of Tennessee for aid heretofore extended to said companies, but the same shall be extended and held as a liability against said consolidated company.

SEC. 8. *Be it further enacted*, That an election shall be held by the stockholders of the Tennessee and Alabama Railroad, and the Central Southern Railroad, jointly, on the first Monday in May next, at the Town of Pulaski, in Giles County, for Directors for said roads thus combined, who shall be elected in the same manner as is now provided for the Tennessee and Alabama Railroad in its charter, and shall hold their office for one year, and until their successors are elected and qualified.

SEC. 9. *Be it further enacted*, that the Tennessee and Alabama Railroad and the Central Southern Railroad, thus consolidated, may, through their Directors thus elected, be consolidated with the Alabama and Tennessee Central Railroad, upon such terms as may be agreed upon between them, and approved by the stockholders of said roads, to be hereafter known as

the Nashville and Decatur Railroad; such terms not to be in conflict in anywise with those herein contained, but may be supplementary or in addition thereto; *provided*, The consolidation herein provided for be approved by Act of the Legislature of the State of Alabama, heretofore or hereafter passed, and said railroad, thus consolidated, may, by their stockholders, regularly convened, upon thirty days' notice in the newspapers of Nashville and Huntsville, elect Directors to serve them for the term of twelve months, and until their successors shall be elected.

SEC. 10. *Be it further enacted*, That the capital stock of said united companies shall be the aggregate amount of their respective charters, with the addition thereto of dollars; and that this Act shall take effect from and after its passage.

The consolidation provided for by said statute was approved by an Act of the Legislature of Alabama. The terms of the consolidation were by appropriate action referred to an executive committee, which committee embodied their suggestions in the form of a resolution, which was as follows:

"*Resolved*, That under the authority delegated to the executive committee by the respective stockholders of the Tennessee and Alabama, Central Southern, and Tennessee and Alabama *Central* Railroad Companies, the committee have agreed that the capital stock of each company shall represent the value of its road, and that therefore each of the companies herein mentioned, shall surrender to the Nashville and Decatur Railroad Company all of its rights, franchises, and property; the Nashville and Decatur Railroad Company assuming to pay all debts owing by the several companies, and being hereby especially pledged to protect all persons who have made themselves individually liable for the debts of any of the several companies, and that the stockholders of each company shall be entitled to and receive credit for the same amount of stock in the Nashville and Decatur Railroad Company that they own in any of the several companies; these constituting and comprising the whole basis of settlement.',

On November 21, 1866, at a convention of stockholders of the Tennessee and Alabama, the Central Southern, and the Tennessee and Alabama *Central* Railroad Companies, the resolution aforesaid was unanimously confirmed by the convention, and the three roads were "declared to be united and consolidated under the style of the Nashville and Decatur Railroad."

On March 8, 1867, the General Assembly of the State of Tennessee passed an Act, the first section of which is as follows:

"That the consolidation aforesaid be and and the same is hereby as

fully confirmed in all respects as if the convention had been held on the first Monday of May, 1866, and that the said consolidation and all acts of said convention be and the same are hereby declared valid."

The stock of the Nashville and Decatur Railroad Company is $1,356,000, about $717,000 of which is owned by non-residents of the State. W. M. Duncan and John Orr, whose shares of stock the petition specifically prays shall be assessed, as well as those of all other stockholders, own and hold stock to the amount of $.

The Circuit Court's judgment was based on the ground that the shares of stock in the Nashville and Decatur Railroad Company are exempt from taxation by the terms of its charter.

ASSIGNMENT OF ERRORS.

I. The Circuit Court erred in overruling plaintiff's demurrer to defendant's answer, and refusing the peremptory writ of mandamus as prayed for in the petition.

II. The Circuit Court erred in dismissing plaintiff's petition.

III. The Circuit Court erred in holding that the shares of stock in the Nashville and Decatur Railroad Company are exempt from taxation by the terms of its charter.

IV. The Circuit Court erred in holding that the charters of the Central Southern and the Tennessee and Alabama Railroad Companies conferred upon those companies or their stockholders any exemption from taxation by reference to the charter of the Nashville and Chattanooga Railroad Company.

V. The Circuit Court erred in holding that the charter of the Nashville and Decatur Railroad Company conferred upon that company any exemption from taxation by reference to the charter of the Nashville and Chattanooga Railroad Company.

VI. The Circuit Court erred in holding that the charter of the Nashville and Chattanooga Railroad Company contained any exemption from taxation of the shares of stock.

BRIEF.

The shares of stock in the Nashville and Decatur Railroad Company are not exempt from taxation under the 38th section of the charter of the Nashville and Chattanooga Railroad Company, assuming that the former company took the benefit of the exemption in said section.

FIRST.

The capital stock of a corporation is a distinct thing from the shares of stock, and owned by different persons. The exemption of one does not necessarily exempt the other from taxation.

Farrington v. *Tennessee*, 95 U. S., 679.

Burroughs on Taxation, p. 164, sec. 83.

City of Memphis v. *Ensley*, 6 Baxter, 553.

Nashville Gaslight Co. v. *Nashville*, 8 Lea, 406.

Van Allen v. *Assessors*, 3 Wall., 573.

People v. *Commissioners*, 4 Wall., 458.

Memphis v. *Farrington*, 8 Baxter, 539

1 *Desty on Taxation*, 353.

SECOND.

It was not the intention of the Legislature in granting this charter, that the exemption of the capital stock, should embrace the shares of stock.

1. Circumstances surrounding the Legislature, at the time the charter was granted, show that it had a clear appreciation of the distinction between capital stock and shares of stock.

a. Act of 1836 taxing stocks—passed nine years before the act incorporating the Nashville & Chattanooga Railroad Company.

b. Union Bank v. *The State*, 9 Yerg. (Tenn.) 490, decided in 1836, declaring distinction between capital stock and shares of stock for taxation purposes.

c. Act of 1844 taxing all stock of individual resident stockholders in all the incorporated companies in the State.

2. The contract of exemption was made with the Railroad Company, and not with the stockholders.

a. Use of the word "company" in the charter.

3. The words "capital stock" are not used in the charter as synonymous with "shares" of stock.

Morawetz on Corporations, section 18.

National Banking Act.

Charter of Union Bank.

4. Nor is there any substantial distinction between "capital stock" and "capital" as used in the charter.

Burroughs on Taxation, section 83.

1 Desty on Taxation, 353.

Railroad Companies v. *Gaines*, 97 U. S., 697.

Memphis & Charleston R. R. Co. v. *Gaines*, 3 Tenn. Ch., 611.

Chattanooga v. *Railroad Co.*, 7 Lea 561.

5. Although the shares of stock and the property of the Company be taxed, it yet has a valuable privilege left in the exemption of the capital stock.

a. The capital stock is an important element in ascertaining the value of railroad property.

1 Desty on Taxation, 348.

Louisville & Nashville R. R. Co. v. *State*, 8 Heisk, 795.

State Railroad Tax Cases, 92 U. S., 603.

Farrington v. *Tennessee*, 95 U. S., 679.

Act of Tennessee Legislature of 1875 for assessing railroad property.

b. The Legislature may tax capital stock, as such, separately. Such a tax would be, not a property tax, but in the nature of a privilege tax.

Code of Tennessee, section 553.

Delaware Railroad Tax Cases, 18 Wall., 206.

Bank of Commerce v. *New York City*, 2 Black, 628.

People v. *Home Insurance Co.*, 92 N. Y., 328.

6. No reliance can be placed by defendant upon contemporaneous construction, because the stock has never been taxed.

a. Mere non-user of the taxing power by the State does not destroy the power or form any reason for not exercising it.

Chicago & R. R. Co. v. *Iowa*, 94 U. S., 155.

THIRD.

The charter of the Nashville and Decatur Railroad Company confers no exemption from taxation whatever.

1. The Central Southern and the Tennessee and Alabama Railroad Companies acquired no exemption from taxation whatever, for the reason that the grant to them of all the "rights, powers, and privileges" of the Nashville and Chattanooga Railroad Company was not intended to, and did not carry with it any exemption from taxation.

a It has been decided by the Supreme Court of Tennessee that

the grant to one company of the "privileges" of another company does not carry an exemption from taxation.

Wilson v. *Gaines*, 9 Baxter, 546.

b This decision is not contrary to the decisions of this Court on that point. The question has never been definitely raised in any of the cases decided by this Court.

Humphreps v. *Pegues*, 16 Wall., 244.
Tomlinson v. *Branch*, 15 Wall., 460.
South-western Railroad Co. v. *Georgia*, 92 U. S., 676.
Chesapeake and Ohio Railroad Co. v. *Virginia*, 94 U. S., 718.
Railroad Companies v. *Gaines*, 97 U. S., 697.
Railroad Company v. *Georgia*, 98 U. S., 360.
Railroad Company v. *County of Hamblen*, 102 U. S., 273.
Wilson v. *Gaines*, 103 U. S.. 417.

FOURTH.

The consolidation of the Central Southern and the Tennessee and Alabama Railroad Companies worked a dissolution of those companies, and thereby destroyed whatever exemption from taxation they may have originally possessed.

Railroad Company v. *Georgia*, 98 U. S., 359.
Shields v. *Ohio*, 95 U. S., 319.
Railroad Company v. *Maine*, 96 U. S., 499.
St. Louis, etc., Railway Company v. *Berry*, 113 U. S., 465.

FIFTH.

The new company, the Nashville and Decatur Railroad Company derived all its rights and privileges from the Act of April 19, 1866, creating it a corporation. That Act declares that the Company "for its government be entitled to all the rights and privileges" of the Nashville and Chattanooga Railroad Company. It was not the intention of the Legislature to confer upon the new Company any exemptions from taxation whatever.

1. The Nashville and Decatur Railroad Company was not incorporated for the purpose of building a new road, but of taking charge of, and operating, a road already constructed and equipped. There could, therefore, have been no motive on the part of the Legislature to grant an exemption from taxation to the new Company.

Chesapeake and Ohio Railway Company v. *Miller*, 114 U. S., 176.

2. The words "for its government" in the Nashville and Decatur charter are words of limitation, and definitely exclude the idea of exemption from taxation.

Railroad Company v. *Gaines*, 97 U. S., 697.

Railroad Company v. *Commissioners*, 103 U. S., 1.

SIXTH.

The Legislature has the power to tax the shares of non-resident stockholders.

1. The statutes of Tennessee provide for the assessment and taxation of shares of stock held by non-resident stockholders.

a. Act of January 19, 1844, imposed a tax on the shares of stock of resident stockholders.

b. Act of February 4, 1848, imposed a tax on shares of stock of non-resident stockholders.

c. Changed by the Code, section 541 (1858), by implication, to tax on resident stockholders.

d. Changed again by Acts of March 12, 1869, March 25, 1873, to tax on non-resident stockholders, and this is the existing law.

2. The legal fiction that personal property follows the owner can be abolished by the Legislature, and all such property within the jurisdiction of the State can be made subject to its laws.

Story on Conflict of Laws, sections 379, 380, 390, 393.

Green v. *Buskirk*, 5 Wall., 307, and 7 Wall., 139.

3. Whatever property the State can, through its courts, seize and validly deprive the owner of his title thereto, is within its jurisdiction and subject to taxation.

Cooper v. *Reynolds*, 10 Wall., 308.

U. S. v. *Muller*, 11 Wall., 263.

4. The legal fiction that movables follow the person has no existence so far as the taxing power is concerned.

a. As to tangible personal property.

Hoyt v. *Commissioners*, 23 N. Y., 224.

b. As to choses in action.

People v. *Smith*, 88 N. Y., 576.

People v. *Gardner*, 51 Barb., 352.

Catlin v. *Hull*, 21 Vt., 152.

People v. *Home Insurance Co.*, 29 Cal., 533.

State v. *St. Louis County Court*, 47 Mo., 574.

Maltby v. *Reading R. R. Co.*, 52 Penn. St., 140.

c. The case of *State Tax on Foreign Held Bonds*, 15 Wall., 300, is in accord with the above decisions. See in this connection.

Railroad Co. v. *Jackson*, 7 Wall., 362.

Murray v. *Charleston*, 96 U. S., 432.

Railroad Co. v. *Collector*, 100 U. S., 327.

See opinion of Mr. Justice Bradley in Appendix, to. 106 U. S.

5. The *situs* of shares of stock is at the location of the corporation.

Ohio & Miss. R. R. Co. v. *Wheeler*, 1 Black, 286.

Muller v. *Dows*, 94 U. S., 444.

Wharton's Conflict of Laws, section 359.

Story's Conflict of Laws, section 383; n. 4, 6.

Mayor, etc., of Nashville v. *Thomas*, 5 Cold., 604.

Bedford v. *Mayor, etc., of Nashville*, 7 Heisk, 412.

National Bank v. *Commonwealth*, 9 Wall., 353.

Tappan v. *National Bank*, 19 Wall., 460.

First National Bank v. *Smith*, 45 Ill., 44.

Faxon v. *McCosh*, 12 Iowa, 527.

The question as to whether the 38th section of the Nashville and Chattanooga charter exempts the shares of stock from taxation has been discussed in my argument in that case and need not be repeated here.

[The headings Third, Fourth, Fifth, Sixth of the foregoing brief correspond with First, Second, Third, Fourth of the argumen following:]

ARGUMENT.

The charter of the Nashville and Decatur Railroad Company confers no exemption from taxation whatever.

Conceding that the 38th section of the charter of the Nashville and Chattanooga Railroad Company exempts the shares of stock from taxation, it is insisted, further, that there is no exemption of any kind contained in the charter of the Nashville and Decatur Railroad Company.

The Nashville and Decatur Railroad Company was formed by the consolidation of the Tennessee and Alabama, the Central Southern, and the Tennessee and Alabama Central Railroad Companies,

the two former being Tennessee corporations and the latter an Alabama corporation.

The charters of the Tennessee and Alabama and the Central Southern Companies both contain this clause, "And the said Company shall have all the rights, powers, and privileges, and be subject to all the restrictions and liabilities prescribed in the charter of the Nashville and Chattanooga Railroad."

What kind of "rights, powers and privileges" are here meant? Clearly, *corporate* "rights, powers and privileges," such as pertain to the organization, management, and government of the corporations.

The "privileges" conferred upon the *stockholders* of the Nashville and Chattanooga Company, if this term includes an exemption from taxation, were purely personal to them, and were not embraced in the transfer of the corporate "privileges" of that Company to the Central Southern and the Tennessee and Alabama Companies.

But however this may be, it is further insisted—

FIRST.

The Central Southern and the Tennessee and Alabama Railroad Companies acquired no exemption whatever from taxation, for the reason that the grant to them of the "rights, powers and privileges" of the Nashville and Chattanooga Railroad Company was not intended to, and did not carry with it any exemption from taxation.

SECOND.

The consolidation of the Central Southern and the Tennessee and Alabama Companies worked a dissolution of those companies, and thereby destroyed whatever exemption from taxation they may have originally possessed.

THIRD.

The new company, the Nashville and Decatur Railroad Company, derived all its rights and privileges from the Act of April 19, 1866, creating it a corporation. That Act declares that the Company, "for its government, shall be entitled to all the rights and privileges" of the Nashville and Chattanooga Railroad Company. It

was not the intention of the Legislature to confer upon the new company any exemption from taxation whatever.

FOURTH.

The Legislature has the power to tax the shares of stock held by non-resident stockholders.

FIRST.

It will certainly not be contended that the words "rights and powers" embrace exemption from taxation. Does the grant of "privileges" carry with it an exemption from taxation?

It is surely not *necessary* to so construe the grant, for there are many and valuable "privileges" contained in the charter of the Nashville and Chattanooga Company which passed to the new companies; such "privileges" as pertain to the affairs of a corporation, and which would naturally suggest themselves to the Legislature as necessary and advantageous to the new companies. The word "privileges" is a very comprehensive term, of large scope and somewhat vague in meaning. Taken in a general sense it does include exemption from taxation, but it embraces so many other things, especially in matters concerning corporations, that its very comprehensiveness is a strong reason why it should not be held in this case to refer to exemption from taxation. For we are concerned here not with definitions, but with the legislative intention in using this word; and hence the more general and vague its meaning the stronger is the presumption that the attention of the Legislature was not directed to its application to the matter of taxation. Can it be said that the Legislature intended to grant away, and that, too, forever, the sovereign right of taxation without once using the word itself, but through means of another word which may embrace in its definition a thousand other things not even remotely related to the matter of taxation?

If the word "privileges" includes exemption from taxation, why may not "rights?" for an exemption, especially in a charter, is legally and technically a "right" which may be enforced against the State. So, too, "benefits"—an exemption is certainly a "benefit," and the most important within the gift of the State.

Nothing is gained by seeking through books for the definition of the word "privileges," and so far as this case is concerned it is labor

lost; for I freely admit that it does, in its definition, embrace exemption from taxation. But so do many other words and phrases, and the simple question is, what particular one or number of such words will the Court select as apt to the purpose of granting away the right of taxation.

The true rule, it seems to me, is, that no statute shall be construed as granting to any person a contract exemption from taxation, unless the Legislature, in so many words, declares that certain property shall be exempt from taxation. For, in this matter, the Legislature is not dealing with such rights and privileges as are conferred upon the corporation to be used and exercised in its relations with third parties, but is granting away one of the sovereign powers of the *State*, which it can never resume except with the consent of the grantee. Surely, it is not too much to demand that this sovereign power shall not be frittered away by the use of words of such large and vague import as to comprehend a multitude of other things, and used, moreover, in a statute which does not mention or even remotely refer to the subject of taxation.

But has the word "privileges" received judicial construction in this connection?

It has been directly and definitely decided by the Supreme Court of Tennessee in three cases—two not reported—that a grant to one company of the "privileges" of another company does not carry any exemption from taxation contained in the charter of the latter company.

The question, as I insist, has never been directly passed upon by this Court.

In *Wilson* v. *Gaines*, 9 Baxter, 546, the Court say:

"The first question, whether privilege is exemption from taxation, has been before us twice; the first time, in the case of the Mississippi and Tennessee Railroad *vs.* the State, at Jackson, and then again in the case of the E. T., Va. & Ga. Railroad *vs.* Hamblin County. In both of which we held after full argument, that the term privilege did not include exemption, nor was it so intended by the Legislature in its use in any or either of the several Acts referred to. However comprehensive a meaning may have been given to the term 'privilege' by the courts of other States or by lexicographers, we are constrained to use it in the restricted sense and meaning given to it by our own laws and the constitution of the State.

"That it was not intended or understood to be sufficiently broad b

the framers of the constitution of 1834, to embrace exemptions, is made clear and indisputable by reference to section 7 of article 9 of that instrument by which it is ordained: 'The Legislature shall have no power to pass any law, granting to any individual or individuals, rights, privileges, inmunities or exemptions, other than such as may,' etc. A Legislature, acting under this constitution for its powers, and as defining its duties, must be conclusively presumed to have used a word or term of the constitution in the sense and with the meaning given it by that constitution. . . . . We are satisfied the term 'privileges' as employed in that constitution; in the connection in which it appears, was used in its restrictive sense. That the interpretation we have given is the correct one, is made the more manifest by the use of the identically same language in section 8 of article 11 of the constitution of 1870, which shows the convention of that year understood the terms 'privileges' and 'exemptions' to perform distinct offices, and to have been employed with different meanings, the latter more comprehensive.

"The Act of the 11th of December, 1845, section 38, uses the word exempt. If the Legislature, in the acts incorporating the Edgefield and Kentucky road, had intended to give it immunity from taxation, the natural way of so doing would have been in the use of the term exemption as suggested by the controlling word exempt in the section referred to.

"The use in the statutes of two only of the words of the constitution, *i. e.*, 'rights' and 'privileges,' and the omission to employ either of the other two following in immediate succession, viz.: 'immunities' and 'exemptions,' either of which would have made clear the construction claimed by complainant, evidence a purposed intention on the part of the Legislature not to grant the benefit claimed by the bill, but, on the contrary, to reserve it for the advantage of the State. . . . .

"In the case of *Humphreys* v. *Pigues*, 16 Wall., to which we are referred as authority against our conclusion in the former opinions of this Court, the meaning of the term 'privilege' is not discussed. A reading of the report shows clearly that it was in no way brought to the attention of the Court, and was in fact not involved; so that while some of the reasoning of the Judge delivering the opinion may seem to militate against the conclusion to which we have arrived, we must remember the discussion was of an entirely different question, and to sustain an entirely distinct conclusion, in no manner involving the meaning of the term 'privilege.'"

It will be thus seen that the Supreme Court of Tennessee has, in three well-considered cases "after full argument," decided that the term "privilege' does not include exemption, placing their decision upon the peculiar use of that word in the constitution.

As to the decisions of this Court, it will be found upon examination, that the Court often use the word "privileges" to express exemption from taxation, as, indeed, it is an apt term for that purpose, and again, in some cases, assume that the grant of "privileges" carries exemption, and again, speak of an exemption as being a "privilege." But nowhere has the question come directly before the Court as whether the *Legislature* in using the term intended to embrace within its scope exemption from taxation.

The case of *Humphreys* v. *Pegyes*, 16 Wallace, 244, was this: The original charter of the Northeastern Railroad Company contained no exemption from taxation, but an amendment to the charter did grant an exemption. The charter of the Cheraw and Darlington Railroad Company had this provision:

"That all the powers, rights and privileges granted by the charter of the Northeastern Railroad Company, are hereby granted to the Cheraw and Darlington Railroad Company, and subject to the conditions therein contained."

The question was, whether the grant to the Cheraw and Darlington Railroad Company was only of the rights, powers and privileges contained in the original charter of the Northeastern Railroad Company, or whether the grant embraced the rights, powers and privileges conferred by the amendment to said charter.

The argument of counsel for the State was directed to this question alone, and Mr. Justice Hunt, in delivering the opinion of the Court, says:

"The stockholders of the Cheraw and Darlington Company contended that the Act of the 19th of December, 1885, entitled, "An Act to amend the charter of the Northeastern Railroad Company, etc.,' formed a part of the Northeastern Company in 1836, when the privileges conferred upon that Company were granted to the Cheraw and Darlington Company."

"The State contends that the privileges thus granted were limited to those conferred upon the Northeastern by its original charter or act of incorporation. passed in 1851."

It is true, he follows this with these words:

"All the 'privileges' as well as powers and rights of the prior company, were granted to the latter. A more important, or more comprehensive privilege than a perpetual immunity from taxation can scarcely be

imagined. It contains the essential idea of a peculiar benefit or advantage of a special exemption from a burden falling upon others."

It will be observed that the question as to whether the Legislature intended to include exemption from taxation among the "privileges" granted, not only did not arise, but it was assumed by counsel and the Court that it did so intend. The learned Justice does not propose to give a judicial construction to the term. In the argument of counsel it was contended "that an exemption from taxation was never to be implied; that nothing less than a clear intention on the part of the Legislature, expressed in terms which admit of no other reasonable construction, would suffice to sustain a *privilege* so valuable," etc. It is clear that counsel assumed that in that case "privileges" embraced exemption.

The case of *Tomlinson* v. *Branch*, 15 Wall., 460, was this: The South Carolina Railroad Company had a perpetual exemption from taxation. It was consolidated by an Act of the Legislature with the South Carolina Canal and Railroad Company, the Act declaring that all the "rights, privileges and property" of the South Carolina Canal and Railroad Company should vest in the South Carolina Railroad Company. The South Carolina Canal and Railroad Company had an exemption in its charter which had expired, and cut no figure in the case. But the South Carolina Railroad Company claimed that it took the property of the other Company and held it subject to the perpetual exemption clause in its own charter, which claim the Court held unfounded. This case does not even remotely touch the question here.

In the *South-western Railroad Company* v. *Georgia*, 92 U. S., 676, the South-western Railroad Company having a charter exemption was united with the Muscogee Railroad Company having a similar exemption; the latter Company was extinguished and all its rights, privileges and property became vested in the former company. The Court say: "The exemption from taxation, which both the companies enjoyed under their *original* charters, cannot, therefore, be withdrawn by the Legislature, and it is unaffected by the tax laws of 1874." That is to say, that under the well-settled doctrine as to the legislative intent in cases of consolidation, the property of each company was protected by the exemption in its own charter, and no exemption rights passed from one to the other.

The case of the *Chesapeake and Ohio Railway Company* v. *Virginia*,

94 U. S., 718, was this: The charter of the Covington and Ohio Railroad Company exempted its property from taxation. But the Company was never organized. A subsequent Act authorized the consolidation of the Covington and Ohio Company, when organized, with the Virginia Central Railroad Company, the consolidated company to have all the rights and privileges of the original companies and to be called the Chesapeake and Ohio Railroad Company. No consolidation, however, took place. The same Act authorized the Virginia Central Company to contract with the Commissioners of the Covington and Ohio Company for the construction of the road from Covington to the Ohio river and conferred upon the Virginia Central all the *benefits* of the Covington and Ohio Company, and also all the rights and *privileges* of the Chesapeake and Ohio Railroad Company when organized. The Virginia Central claimed that its own original property was exempt from taxation by reason of the grant to it of the *benefits* of the charter of the Covington and Ohio Company and the rights and *privileges* of the Chesapeake and Ohio Company. But the Court denied the claim here as in *Tomlinson* v. *Branch* and other cases, on the ground, in the language of Mr. Justice Strong, that "the consolidated company would have acquired, as we have seen, no greater immunities from taxation than the consolidated companies had prior to the union, and would have held them distributively," etc.

Now, in this case, so far from any question being made on the import of the word "privileges," the Court assumes, not only that this word embraced exemption from taxation, but that the word "benefits" also had the same meaning and scope. And certainly the Court would not, upon a proper test, embrace exemption under the latter term.

Now, this case, so far as it is any authority upon the question at issue, is against the defendant's contention. For, although the Virginia Central acquired all the "benefits" and "privileges" of the other companies, it did not take the exemption from taxation contained in their charters.

In *Railroad Companies* v. *Gaines*, 97 U. S., 697, the question was this:

The Knoxville and Charleston Railroad Company, for the purpose of making and using its road, was invested with all the powers, rights and privileges of the Nashville and Chattanooga Rail-

road Company. The Court held that the grant was one simply of franchises and not of exemption from taxation. The Court say:

"In *Humphreys* v. *Fegues* (16 Wall., 544) we held that the grant to one company of 'all the powers, rights, and privileges' of another, carried with it an exemption from taxation," etc.

It is respectfully submitted that this language was not necessary to the decision of the question involved in the cause. Had the exemption claimed by the Company been sustained it would have had great force as an authoritative declaration, but the exemption was denied on the ground that the grant was limited by the words "for the purpose of making and using its road."

In *Railroad Company* v. *Georgia*, 98 U. S., 360, it was held that the grant of "rights, privileges, and *immunities*" carried an exemption from taxation, but whether any and what effect was given to the word "immunities" by the court, we are unable to determine.

One of the cases referred to in *Wilson* v. *Gaines*, 9 Baxter, 546, as having been decided by the Supreme Court of Tennessee on the construction of the word "privileges," is *E. T., Va. & Ga. R.R.* v. *Hamblen County*. This case came to this court and is reported as the *Railroad Company* v. *The County of Hamblen*, 102 U. S., 273. The Cincinnati, Cumberland Gap and Charleston Railroad Company was granted all the "rights, powers and privileges" of the Nashville and Louisville Railroad Company, and the Supreme Court of Tennessee decided that "privileges" did not embrace exemption from taxation. This Court say:

"This disposes of the case, and makes it unnecessary to consider whether the immunity from taxation which the Nashville and Louisville Company had by its charter was granted to the Cincinnati, Cumberland Gap and Charleston Company."

Also, in *Wilson* v. *Gaines*, which cause came to this court, and is reported by that name in 103 U. S., 417, the Court say:

"The Supreme Court of the State dismissed the bill, holding that the exemption from taxation which was granted to the Nashville and Chattanooga Company was not one of the privileges of that Company which passed to the Edgefield and Kentucky Company, either by its original or amended charter. To reverse that decree the case has been brought here by writ of error.

"In the view we take of this case it is unnecessary to determine the question on which the decision seems to have turned in the court below,

for, as we think, it has not been shown that if the property in the hands of the original company was exempt from taxation, that exemption passed to the purchasers at the sale to foreclose the State's statutory lien under which the complainant claims."

Thus it will be seen that in two important cases coming to this court from the Supreme Court of Tennessee, in which the State court had construed the word "privileges" as not embracing exemption, this court refused to consider the question, preferring to rest their decisions on other points.

Is it not clear, then, that this court did not regard this question as settled by their own previous decisions, but as still open.

If this be so, we respectfully submit these decisions of the Supreme Court of Tennessee as authority upon a question concerning the construction of the State Constitution.

If, as repeatedly decided by this court, the circumstances under which the Legislature acted can be looked to in determining their meaning in the use of the word "privileges," surely the Constitution of the State, by whose authority it is governed, can be looked to for the same purpose. And the construction put upon that Constitution by the State's highest court is entitled to great weight.

SECOND.

The consolidation of the Central Southern and the Tennessee and Alabama companies worked a dissolution of those companies, and thereby destroyed whatever exemption from taxation they may have originally possessed.

The act of consolidation provides as follows:

"That for the purpose of uniting and consolidating the Tennessee and Alabama Railroad Company, and the Central Southern Railroad Company into one, the Directors of said company be, and they are hereby authorized to agree upon the terms thereof, and to adopt all necessary and proper measures, agreements, and obligations to effect the same, provided said terms of consolidation, when perfected by the directors of said companies, shall be submitted to a vote of the stockholders of said companies, and if assented to by a majority of the stockholders the same shall be binding upon said companies, and that thereafter and upon final report to the Presidents of the respective companies and the Comptroller of the State, the consolidated and united companies shall be known and styled as the Nashville and Decatur Railroad Co., by which name it shall

sue and be sued, and be entitled to all the rights and privileges, and be subject to all the liabilities and restrictions of a body corporate."

And in the next section:

"That the said Nashville and Decatur Railroad Company shall, for its government, be entitled to all the rights and privileges; and subject to all the restrictions and liabilities conferred and imposed upon the Nashville and Chattanooga Railroad Company, *provided* that no State aid is intended to be extended to said Nashville and Decatur Railroad Company; *provided, further*, that no new liability to the State of Tennessee is intended to be imposed hereby upon said Tennessee and Alabama Railroad Company and Central Southern Railroad Company."

In accordance with this statute the stockholders agreed upon the terms of consolidation as follows:

"That the capital stock of each company shall represent the value of its road, and that therefore each of the companies herein mentioned shall surrender to the Nashville and Decatur Railroad Company all of its rights, franchises and property, the Nashville and Decatur Railroad Company assuming to pay all debts owing by the several companies, and being hereby especially obliged to protect all persons who have made themselves individually liable for the debts of any of the several companies, and that the stockholders of each company shall be entitled to and receive credit for the same amount of stock in the Nashville and Decatur Railroad Company that they owned in any of the several companies, these constituting and comprising the whole basis of settlement."

This action of the stockholders was ratified by the Legislature.

The above statute and action of the stockholders thereunder show:

1. Out of the two old companies an entirely new company was formed, viz.:

THE NASHVILLE AND DECATUR RAILROAD COMPANY.

This new company took whatever rights and privileges it had, not under the charters of the old companies, but under a charter of its own.

2. The old companies surrendered to the new company all their rights, franchises and property. They were thus deprived not only of all their property, but even of the right to run cars, collect tolls, etc.

3. The stockholders gave up their stock in the old companies and took stock in the new company, thereby, of course, becoming stockholders in the new company.

Thus, without property, franchises, or stockholders, what became of the old companies? The new company owned and controlled the whole line of road, and its affairs were administered under a charter other than and distinct from those of the old companies. There certainly was a new company brought into existence, viz.: The Nashville and Decatur Railroad Company. Did the old companies exist along with the new company? If so, under what kind of government, and with what rights and franchises?

It would be difficult to conceive an Act of Consolidation which more thoroughly and completely annihilated the consolidating companies and created a new and distinct corporation in their place.

The case of the *Railroad Company* v. *Georgia*, 98 U. S., 359, was this: The Savannah, Albany and Gulf Railroad Company, and the Atlantic and Gulf Railroad Company, had each a grant of exemption from taxation in their charters. Mr. Justice Strong thus states the Act of the Legislature under which the two companies were consolidated:

"On the 18th day of April, 1863, the Legislature of the State passed an act whereby they were empowered to consolidate their stocks upon such terms as might be agreed upon by the Directors and ratified by a majority of the stockholders; and the Act enacted that when so consolidated they should be known as 'The Atlantic and Gulf Railroad Company,' with a proviso that nothing therein contained should relieve or discharge either of them from any contract theretofore entered into by either, but this company should be liable on the same. By the second section it was enacted that the stockholders of said consolidated railroad companies, by such corporate name and in such corporate capacity. should be capable in law to have, purchase, and enjoy such real and personal estate, goods, and effects as might be necessary and proper to carry out the objects therein specified, and to secure the full enjoyment of all the rights therein and thereby granted, and by said name to sue and be sued, plead and be impleaded, in any court of competent jurisdiction; to have and use a common seal, and the same to alter at pleasure; to make and establish by-laws, and generally to exercise corporate powers."

"The third Section of the Act declared that the several immunities, franchises and privileges granted to the said Savannah, Albany and Gulf Railroad Company, and the Atlantic and Gulf Railroad Company, by their original charters and amendments thereof, and the liabilities therein imposed, should continue in force, except so far as they might be inconsistent with the Act of Consolidation."

The Court held that the old companies were by the consolidation dissolved and a new company created, which took all of its immunities, franchises and privileges under the third section of the Act.

Mr. Justice Strong says:

"It is conceded that under this Act a consolidation took place. It is, therefore, a vital question. What was the effect? Did the consolidated companies become a new corporation, holding its powers and privileges as such under the Act of 1863? Or was the consolidation a mere alliance between two pre existing corporations, in which each preserved its identity and distinctive existence? Or, still further, was it an absorption of one by another, whereby the former was dissolved, while the latter continued to exist? The answers to these inquiries must be found in the intention of the Legislature as expressed in the consolidating Act. We think that intention was the creation of a new corporation out of the stockholders of the two previously existing companies. The consolidation provided for was clearly not a merger of one into the other, as was the case of *Central Railroad and Banking Company* v. *Georgia*, 92 U. S., 665. Nor was it a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence, as well as its corporate name. But the Act authorized the *consolidation of the stocks of the two companies, thus making one capital in place of two* It contemplated, therefore, that the separate capital of each company should go out of existence as the capital of that company; and, if so, how could either have a continued separate being? . . . . . Looking thus at th Legislative intent appearing in the consolidation Act, we are constrained to the conclusion that a new corporation was created by the consolidation effected thereunder in the place and in lieu of the two companies previously existing, and that whatever franchises, immunities, or privileges it possesses, it holds them solely by virtue of the grant that Act made."

In the case of the *St. Louis, Iron Mountain and Southern Railway Co.* v. *Berry*, 113 U. S., 465, the Cairo and Fulton Railroad Company entered into an agreement of consolidation with the St. Louis and Iron Mountain Railroad Company by which it was agreed "to merge and consolidate the capital stock, franchises and property of the said two corporations, so that the same shall become the capital stock, franchises and property of one corporation;" the name of the new company to be the St. Louis, Iron Mcountain and Southern Railway Co., that "every stockholder in each of the corporations, parties hereto of the first and second parts, shall receive, in place of stock held by him in said corporations, stock in the new

corporation as follows,".: that "upon the consummation of said Act of Consolidation, as provided by law, all and singular the rights, privileges and franchises of each of said corporations parties hereto, and all other property, real, personal and mixed, and all debts due on whatever account, as well stock subscriptions, as all other things in action belonging to each and every one of said corporations, parties hereto, shall be taken and deemed to be transferred to and vested in the St. Louis, Iron Mountain and Southern Railway Company, as such new corporation, without further act and deed," etc.

The consolidated company claimed the exemption from taxation contained in the charter of the Cairo and Fulton Railroad Company. *Held*, that the consolidation extinguished that company and thus its exemption from taxation. Mr. Justice Matthews says:

"The consolidated company, the St. Louis, Iron Mountain and Southern Railway Company, the plaintiff in error, is not the identical corporation, which was the Cairo and Fulton Railroad Company. The terms of the Act and agreement of consolidation, which by the express language of the charter of the Cairo and Fulton Railroad Company, became, on adoption, the charter of the consolidated company, created a new corporation."

The facts of this case are substantially identical with those of our case and the same result must necessarily follow.

See also *Shields* v. *Ohio*, 95 U. S., 319.

Railroad Company v. *Maine*, 96, U. S., 499.

The Central Southern and the Tennessee and Alabama Railroad Companies, therefore, were extinguished by the consolidation, and their exemptions were necessarily destroyed.

The Act of Consolidation provides:

"That no State aid is intended to be extended to the Nashville and Decatur Railroad Company; provided further, that no new liability to the State of Tennessee is intended to be imposed hereby upon said Tennessee and Alabama Railroad Company, and Central Southern Railroad Company."

The obvious meaning of this clause is that no new liability is to be imposed by this statute. The Tennessee and Alabama and the Central Southern Railroad Companies sought and consented to a consolidation of themselves into a new company. The legal result of such consolidation was, that they went out of existence, and with their decease, of course, ex-

pired their exemptions. Upon the expiration of their exemptions the property became subject to the general tax laws of the State. This particular Act imposes upon them no liability to taxation, for it has no concern whatever with the matter of taxation. If the purpose of the above quoted language is to continue the exemptions from taxation, and that, too, without the faintest reference to taxation as one of the contemplated "liabilities," this would certainly be a most glaring instance of the grant of an exemption from taxation upon the merest implication and presumption.

In *United States* v. *Herron*, 20 Wall., 251, the Court, speaking of the principle that the State is not bound by general words in a statute, say:

"Sanctioned, as that principle is by two express decisions of this Court, it would seem that further discussion of it is unnecessary, as it has never been questioned by any well considered case, State or Federal, and is founded in the presumption that the Legislature, if they intended to divest the sovereign power of any right, privilege, title or interest, would say so in express words; and where the Act contains no words to express such an intent, that it will be presumed that the intent does not exist."

The above proviso against an implied grant of State aid has no significance as an index to the legislative intent. Former Legislatures had granted many millions of bonds to railroad companies to aid in their construction, and many of the Acts relating to railroads, passed after the war, contain such a proviso, inserted out of superabundant caution, in order to exclude all possibility of granting further aid by any inference from the language of the Act.

THIRD.

The new company, the Nashville and Decatur Railroad Company, derived all its rights and privileges from the Act of April 19, 1866, creating it a corporation. That Act declares that the company, "for its government, be entitled to all the rights and privileges" of the Nashville and Chattanooga Railroad Company.

It was not the intention of the Legislature to confer upon the new company any exemption from taxation whatever.

Now, conceding that the grant of "privileges" carries exemption from taxation, yet it is not a cast-iron rule of law that such a result should always follow.

The question, at last, is one of legislative intent.

This is clearly seen in the case of the *Chesapeake and Ohio Railroad Company* v. *Virginia*, cited above. There, although the Virginia Central Company took all the "rights, benefits and privileges" of the two old companies, yet this did not avail to give its own property the benefit of the exemption from taxation held by the old companies; and for the reason that, under the circumstances of the case, the Court did not regard such to have been the intention of the Legislature.

The question then, before us, is, Did the Legislature, in the Act creating the Nashville and Decatur Railroad Company, intend to give that company the benefit of whatever exemption from taxation the Nashville and Chattanooga Railroad Company held by virtue of its charter

That the charter of the Nashville and Decatur Railroad Company constitutes a contract with the State, which is protected from violation by the Constitution of the United States, admits of no doubt.

But, looking at all the circumstances existing at the time, does it appear, beyond a reasonable doubt, that the Legislature intended to confer upon that Company a perpetual exemption from taxation.

The consolidation had destroyed the old original companies, and it was necessary to obtain legislative aid to secure a new company to take charge of and run the united roads.

Accordingly, the Nashville and Decatur Railroad Company was created by the Act of April 19, 1866.

Now, it must be borne in mind that this was not the creation of a corporation for the purpose of constructing a railroad, but of a corporation to take charge of, own and operate two railroads already in existence. The old companies had built, equipped and had in operation the roads for several years. The creation of the new corporation could be of no benefit to the State, so far as the opening of a new line of road was concerned, for the road was already opened and in operation as a continuous line from Nashville to Decatur, but under the management of two separate and distinct corporations, the two roads joining each other at the town of Columbia, Tennessee.

But the stockholders considered it as better for their interests

that the two companies should be amalgamated, so that the whole line of road would be under one management.

This was a matter entirely within their own choice, for the State had no power, of course, to compel them to unite.

The construction of a new line of railroad, opening up the country and affording facilities for transportation of freight and passengers, is a matter of public importance and benefit; and Legislatures in consideration of the great advantages to be thus conferred upon the whole people of the State, have always been anxious to assist the promotion of such companies, that assistance often consisting of grants of exemptions from taxation.

But the benefits to be derived from the consolidation of railroad companies are purely problematical, and more often designed for the benefit of particular individuals than of the community at large.

The stockholders in the old companies had already paid in their money and received their certificates of stock; they did not propose to contribute another dollar to the new company, nor does it appear that they ever did so.

Now, is it reasonable to suppose that the Legislature, acting in the interests of the whole State, should have given to this new company or its stockholders an exemption from taxation, and that, too, without the slightest public advantage to be derived from such action?

The case of the *Chesapeake and Ohio Railway Company* v. *Miller*, 114 U. S., 176, was this:

The property of the Chesapeake and Ohio Railroad Company was exempt from taxation in its charter. Under foreclosure proceedings instituted by the mortgage bondholders, the road was sold, and the purchasers, in accordance with a statute of West Virginia, formed a new company by the name of the Chesapeake and Ohio *Railway* Company. The statute declared that, upon such a sale, the original company should be *ipso facto* dissolved, and that "the corporation created by, or in consequence of such sale and conveyance shall succeed to all such *franchises*, *rights* and *privileges*, and perform all such duties as would have been had, or should have been performed, by the first company, but for such sale and conveyance."

The new company claimed the benefit of the exemption in the

charter of the old company, but the Court held that the new Company took no exemption under the statute.

Mr. Justice Matthews says:

"Broad, general and comprehensive as the language is, we cannot, in reference to the subject matter now in hand, apply it with that force and meaning. . . . There is no express reference to a grant of any exemption or immunity; nothing is said in relation to the subject of taxation. The words actually used do not necessarily embrace a grant of such an exemption."

Then, after quoting from *Morgan* v. *Louisiana* to the effect that the transfer of an exemption cannot be made without express statutory direction, he proceeds:

"Here, there is no such express statutory direction. Nor is there an equivalent implication by necessary construction. There is nothing in the language itself, nor the context, nor the subject matter of the legislation, nor the situation and relation of the parties to be affected, which indicates that a grant of an exemption from taxation to a particuliar railroad corporation, or to a class of such, was in the contemplation of the Legislature. The subject matter of this legislation was not the original construction of railroads, but the operation of railroads already constructed. The State was not in the attitude of a contractor, soliciting subscriptions of capital, in the formation of companies to undertake the risk of public improvements, for the benefit of the State, with the hazard of loss and perhaps financial ruin to the first promoters, and offering exemptions from taxation as a consideration, by way of contract, for the acceptance of its proposals. It was legislating in reference to enterprises already undertaken, prosecuted and completed by companies originally then incorporated, and who, by reason of insolvency, had been stripped of their property by creditors and sentenced by the law to dissolution; and the purpose of the statute was simply to provide suitable means of incorporating the purchasers, to facilitate their use of the property, in operating it for the benefit of the public, as designed from the beginning. The purchasers had not bought the immunity now demanded either from the State or the prior possessors. The contract of the creditors would be fully met, on failure of payment of the stipulated debt, by subjecting to sale the property pledged for its payment, with such rights, franchises and privileges only as were necessary for its beneficial use and enjoyment. The immunity from taxation, as we have already said, was not necessarily included in that designation. The debtor corporation and its creditors

combined could not confer upon the purchasers any rights which were not assignable; and as no consideration moved to the State for a renewal of the grant, there is no motivie for finding, by mere construction and implication, what the words of the law have failed to express."

The only real distinction between this case and the one now before the Court is, that the persons who formed the Chesapeake and Ohio Railway Company were the purchasers of the the property of the old Company, and had not, as the Court say, "bought the immunity now demanded either from the State or the prior possessor." Whereas, in our case the persons forming the new Nashville and Decatur Company were the original stockholders in the old Companies, who had, of course, contributed the money to the capital stock with which the roads had been built. But, assuming that the stockholders had an exemption in the charters of the old Companies, if the Legislature had intended to continue the exemption, it would have done so by transferring the privileges and immunities of the old Companies to the new Company; but in the transfer which was made and ratified by the Act of March 8, 1867, this was exactly what was not done. The language is, "and that therefore each of the Companies herein mentioned shall surrender to the Nashville and Decatur Railroad Company all of its *rights*, *franchises* and *property*," and, of course, this did not pass any exemption from taxation. The fact that the Legislature did not transfer, or authorize the transfer, of the exemption from the old Companies to the new Company shows conclusively, that a desire to recognize the public services rendered by the original stockholders in building the road was not in the mind of the Legislature and could not have influenced its action. Such a motive, therefore, cannot be urged as a reason for inferring a legislative intention to grant an exemption from taxation to the new Company.

But a closer examination of the charter of the Nashville and Decatur Company shows, beyond the shadow of a doubt, that no exemption from taxation was intended to be granted to that Company.

The Act of April 19, 1866, after prescribing the manner of consolidation, says:

"Said consolidated and united companies shall be known and styled as the Nashville and Decatur Railroad Company, by which name it shall

sue and be sued, and be entitled to all the rights and privileges and be subject to all the liabilities and restrictions of a body corporate."

Of course, as the new company was to take charge of a road already built, equipped and in running order, with the stock subscribed and paid in, it was not necessary to prescribe the terms and manner of organization, nor the mode of acquiring land for a right of way, nor other things pertaining to the formation or construction of a new corporation. It only remained to provide rules for the administration and management of the Company's affairs. Instead of setting forth these rules in detail, it was simply done by adopting for this purpose the Charter of the Nashville and Chattanooga Railroad Company in these words:

"That the said Nashville and Decatur Railroad shall, *for its government*, be entitled to all the rights and privileges and be subject to all the restrictions conferred and imposed upon the Nashville and Chattanooga Railroad Company."

This language puts it absolutely beyond doubt that the Legislature had not the slightest intention to grant the new company any exemption from taxation. The words "for its government" are clearly words of limitation, and definitely exclude the idea of exemption from taxation.

It is said that the effect of this section is to copy the provisions of the charter of the Nashville and Chattanooga Company into that of the Nashville and Decatur Company; and so it is, so far as they pertain to the government of the Company's affairs; such, as for example, as prescribe the number of directors and the mode of their election, the manner of voting at stockholders' meetings, the power of the directors to make contracts and its limitations, the method of increasing the stock of the Company, the mode of declaring and paying dividends, the right of the directors to propose and accept amendments to the charter, the proceedings to be had upon the dissolution of the corporation, etc., etc. All provisions of this kind are copied *verbatim* from one charter into the other. But how does the 38th section of the Nashville and Chattanooga charter get into that of the Nashville and Decatur Company? Will the exemption of the capital stock of the Company assist its officers in the administration of its business, or give them any greater facilities in executing the duties of their positions? Does an exemption from tax-

ation pertain, in any way, shape or form, to the government of a company?

We have seen above that a grant to one corporation of *all* the rights and privileges of another does not necessarily carry with it an exemption from taxation, if from the surrounding circumstances it can be seen that such was not the intention of the Legislature. If the Court will infer from circumstances outside of the statute that there was no intention to confer an exemption, will it hesitate to draw the same conclusion from words in the statute which specifically and definitely limit the grant to rights and privileges other than those of exemption from taxation?

In *Railroad Company* v. *Commissioners*, 103 U. S., 1, the Court say:

"The Annapolis and Elk Ridge Company was invested with all the rights and powers necessary to the construction and repair of its railroad, and for that purpose was to have and use all the powers and privileges and be subject to the obligations contained in the enumerated sections of the Baltimore and Ohio charter. Clearly this is not a grant of all the powers and privileges of the Baltimore and Ohio Company named in those sections, but only of such as were necessary to carry into effect the objects for which the new company was incorporated. Such is the plain import of the language employed. Consequently, only such of the privileges of the old company could be enjoyed by the new as were appropriate to the work which the latter was authorized to do."

"The power to construct and repair a railroad undoubtedly implies in the absence of any restrictions, the power to use the road when constructed as railroads are ordinarily used. Such use is in general an incident to the ownership of that kind of property. The powers and privileges of the Baltimore and Ohio Company, therefore, which the new Company was permitted 'to have and use' were such as were necessary to the construction, repair and use of its railroad. Exemption from taxation is not one of these privileges. It is undoubtedly a privilege, but not necessary either to the construction, repair or operation of a railroad. We so held in the case of the Knoxville and Charleston Railroad Company.—*Railroad Companies* v. *Gaines*, 97 *U. S.* 697, where the language of the charter was much like this. Our conclusion then was that the grant to one Company of the the rights and privileges of another, for the purpose of making and using a railroad, carried with it only such rights and privileges as were essential to the operation of the Company, or, to use the language of Mr. Justice Field for the Court in *Morgan* v. *Louis-*

iana, 93 *Id.* 217, the positive rights and privileges without which the road of the Company could not be successfully worked."

And in *Railroad Companies* v. *Gaines*, cited in the above opinion, the Court say:

"The grant here was not of all the rights and privileges of the Nashville and Chattanooga Railroad Company, but of such as were necessary for the purpose of working and using the road, or, in other words, the franchises of the Company, which do not include immunition from taxation."

Nor was the grant to the Nashville and Decatur Company of *all* the rights and privileges of the Nashville and Chattanooga Company, but of such only as were necessary for its government.

Indeed, so far as the extent and importance of the privileges are concerned, the grant to one Company of the privileges of another for the purpose of building and operating a road is larger and more comprehensive than a like grant for the purpose of the government of the Company. For, the construction and operation of the road are the essential things for which the corporation is created; they bring it in constant contact and the closest relations with the public, while the government of the Company is a matter purely of internal regulation, with which outsiders have no concern.

If, then, exemption from taxation is not included in privileges so wide and general as those for construction and operation of the road, it is difficult to see how it can be embraced in those for the government of the Company.

But, it is argued, the words "for its government" are used in the sense of regulation or control by the State.

The learned Justice who decided the cause at the circuit says:

"But the words 'for its government' are not words of limitation. The government of the corporation embraces every part of the conduct and business of the Company, in all its relations to the State, to the general public, to individuals, to its own stockholders. . . . . The charter of the corporation is the law of its government, which consists in the regulations of its business in all its relations, and necessarily includes its rights, privileges and obligations in respect to the State."

It is true that the government of a corporation, in its largest sense, means State regulation as well as regulation of its own affairs. But does the word have that meaning in this charter? The grant by the State of corporate franchises to a Railroad Company is

a grant, (1.) of the right to exist as a corporation, that is, to act as one person; (2.) of certain rights and privileges not enjoyed by a natural person, such as the right of way, of eminent domain, etc.; in addition to this, the charter may prescribe, as in the Nashville and Chattanooga charter, that no other road shall be constructed within a certain distance of the Company's road (Sec. 13.), and penalties upon any person obstructing and intruding upon the road, etc. (Sec. 26–27.) These are all positive rights and privileges conferred by the charter. Then, again, the charter may impose certain restrictions and liabilities upon the Company, such as, in the N. and C. charter, the individual liability of the directors in case they exceed in their contracts a certain amount (Sec. 12), and the restriction as to the charge to be made for freight and passengers, etc. Now the exercise and enforcement of these rights, privileges, liabilities and restrictions bring the company into close relations with the general public. And they may furnish the cause or foundation for State action against the Company. For, if the Company grossly abuses its rights and privileges, or violates the restrictions imposed upon it, the State can, through her Courts, enforce a forfeiture of the charter and dissolution of the corporation. But the State's *right* to thus proceed against the Company is not derived from the charter, but from her inherent power as a government, and is exercised in accordance with the general statutes applying to all corporations.

It is not the grant of certain privileges which gives the State a control over the corporation, but the action of the Company in abusing those privileges which invokes an exercise of the State's inherent power, just as in the case of an individual who violates the law and incurs a penalty therefor. This right of the State to control the Company, in the event of the non-user or mis-user of its powers, is the only right which can be exercised by reason of any provisions in the Nashville and Chattanooga charter, and the exercise of the right depends not on the grant of the privileges made to the Company, but in the abuse of these privileges.

Surely, it cannot be said that the Legislature had reference to any such State government as this in using the words "for its government." And, if it did, it would be difficult to see what sort of a "privilege" the Nashville and Decatur Company acquired thereby.

But, in addition to the State's right to coerce corporate action to obedience of the requirements of the charter, it has, of course, a general and large governmental power in controlling and regulating corporations. In the exercise of this power it treats corporations as individual members of the community, and its action is determined by considerations of public policy. It has, here, no concern with corporate rights and privileges, and takes no account of the provisions of particular charters. This right is comprehensive in its scope, and most beneficial to the public when properly exercised. Of course, such governmental control as this could not have been in the contemplation of the Legislature in using the words, "for its government," for the reason that it is employed in utter disregard of any particular corporate rights and privileges, and a reference to it has no place in the charter of any single corporation. It cannot be granted away, abridged or in any way affected by legislative action, and is not the subject of a contract protected by the Constitution of the United States.

If, then, the word government, as used by the Legislature, does not refer to State control of the company upon the abuse of its rights and privileges, nor to the general regulation of corporations by the State, does it refer specifically and alone to exemption from taxation?

If this be so, is it not strange that the Legislature should have used such a peculiar mode of expression to convey their meaning? If, as our opponents contend, the grant of rights and privileges carries the exemption, why did not the Legislature say so, and stop there? The grant of "rights and privileges" would have carried not only exemption, but all the other benefits of the Nashville and Chattanooga charter to the Nashville and Decatur Company; it would have been fully clothed with everything that had been given to the former company in its charter. Did the Legislature intend to emphasize their intention of including exemption under the word "privileges" by using the words "for its government?" If so, why did it not say, in so many words, that an exemption from taxation was granted?

But was it intended, by the use of these words, to refer, in some sort of vague way, to exemption from taxation? "Government," it is said, means government by the State. In imposing taxes the State exercises one of the highest powers of government. But, in

not imposing taxes, does it govern at all? The State not only refrains from taxing the capital stock of the Nashville and Chattanooga Railroad Company, but has irrevocably bound itself, in that Company's charter, never to tax it. It has made a contract that, so far as that property is concerned, it will never use its taxing power, that it will surrender all capacity for governing the corporation through its sovereign right of taxation. It stands before that Company utterly stripped of all right to apply its general taxing laws to the Company's stock. This is not the case of a corporation having the privilege of being governed by the State in a peculiar manner beneficial to itself, but the case of the utter destruction of all authority to be governed at all by the State. Can such a privilege as this pass to the Nashville and Decatur Company under the grant of privileges "for its government?" It is rather a privilege for its *non*-government. Insert the exemption in the Nashville and Decatur charter, and see how it will read: "The said Nashville and Decatur Railroad shall, for its government," be exempt from paying taxes on its capital stock, or "shall for its government" never be taxed on its capital stock, or "shall, for its government," *never be governed at all.*

The words "for its government" are positive, not negative, terms, and imply affirmative action on the part of some one. They mean to provide for the regulation of this Company and its affairs, and not an entire absence of regulation and control. Their meaning can be clearly seen from the Nashville and Chattanooga charter. Section 4, after appointing the commissioners, says: "Who may establish rules to *govern* their proceedings," etc. In section 9 there is a provision for the meeting of the stockholders at a certain time and place, "at which time and place the said stockholders, in person and by proxy, shall proceed to elect the directors of the company, and to enact all such regulations, rules, and by-laws as may be necessary for the *government* of the corporation," etc.

Here the word is used in its ordinary acceptation, and there is no reason why it should not have the same meaning in the Nashville and Decatur charter. Such a construction is simple, natural and carries out the whole purpose of the Legislature in consolidating the old companies and forming from their stockholders the new company.

There were the stockholders, the road, built, equipped and in

running order; all that was necessary was to provide a mode of government for the new corporation, and this was done by giving it, for that purpose, all the rights and privileges of the Nashville and Chattanooga Company.

No exemption from taxation passed to the Nashville and Decatur Railroad Company.

FOURTH.

AS TO THE TAXATION OF SHARES OF STOCK OWNED BY NON-RESIDENTS OF THIS STATE.

On the 19th day of January, 1844, an Act was passed providing that:

"Money or capital loaned or deposited at interest, or used in shaving notes or other evidence of debt, and all stock of individual resident stockholders in all the incorporated companies, be added to the list of property enumerated in the revenue Act of 1835–6, Acts of 1843, chapter cxv., section 1."

On the 4th day of February, 1848, the Legislature passed the following Act:

"That from and after the passage of this Act, all stock owned by non-resident stockholders, in any of the incorporated companies in this State, shall be added to the list of property enumerated in the Act of 1836, chapter 13, section 1, and shall be subject to taxation, as other property in this State."

These Acts, it will be observed, were passed before the charters of the Tennessee and Alabama and the Central Southern Railroad Companies were granted. These companies were incorporated in 1852 and 1853.

This, however, does not affect the question of the *power* of the Legislature to tax shares of non-residents, yet it has some significance.

This statute for the taxation of the shares of non-residents continued in force until the adoption of the Code in 1858, when the law was changed, not expressly but by implication.

In the enumeration of property subject to taxation, the Code, section 541, sub-sections 7, 9, 10 says:

"All capital lent or deposited, in or out of the State, at interest," etc.

"All investments, by inhabitants of this State, in stocks out of the State."

"All other stocks."

The law was again changed by the Act of March 12, 1869, quoted above.

On 25th day of March, 1873, an Act was passed collating all the different assessment Acts into one. This Act provides,

"That the basis of all assessments shall be as follows, viz: To assess the property in the district or ward in which it lies, or is known to be at the time of assessment; but all stock in banks, banking associations, or other corporations, or joint stock companies, shall be assessed in the place, town, ward, or district in which such bank, banking associations or other corporations are located." Section 4, sub-section 4.

This Act also repeated the provisions of the Act of 1869, referred to above.

Under the law, therefore, as it now exists all shares of stock, whether held by residents or non-residents of the State, are taxed at the location of the corporation.

FIRST.

The State has the power to tax shares of stock held by non-residents in a corporation created by, and located in the State.

The denial of this power is based on the legal proposition that personal property follows the person of the owner, and therefore, it is argued, since the *situs* of such property is at the domicile of the owner—the non-resident—it follows that both the subject matter and person are beyond the jurisdiction of the State, and, hence, not subject to its laws.

The correctness of the proposition, that movables follow the person, is earnestly denied by Mr. Wharton in his work on "The Conflict of Laws." He insists that the legal fiction is not so firmly established, but that it is within the power and duty of the *courts* to disregard it whenever public policy, or convenience, requires it to be done.

Wharton's Conflict of Laws, Sec. ——.

On the other hand Judge Story maintains the correctness of the proposition, and doubts whether a court ought, upon its own general authority, to change or limit the rule, or fiction, of law.

But he expressly and repeatedly asserts that it is competent for the *Legislature* to abolish this legal fiction, and subject all property over which it has jurisdiction, to the operation of its own laws.

Story on Conflict of Laws, Sec. 377, 380, 385, 390, 393.

See also *Green* v. *Van Buskirk*, 5 Wallace, 307.

Same case, 7 Wallace, 139.

A State, then, may tax any and all property, over which it has jurisdiction, whether owned by its own citizens, or by non-residents.

In this State the revenue laws specifically direct the taxation of shares of stock in corporations held by non-residents; and the only question now is whether the State has such jurisdiction over this stock as to authorize the imposition of the tax.

Whatever property the State can, through its courts, seize and validly deprive the owner of his title thereto, such property the State has the power to subject to taxation.

Under the attachment laws of this State, the property of a non-resident debtor can be seized and subjected to the satisfaction of his debts.

Such property includes stock owned by him, and debts due him in the State. Now, in attachment cases, the jurisdiction of the Court depends upon the actual seizure of the property.

Cooper v. *Reynolds*, 10 Wallace, page 308.

Stocks and debts, therefore, must be located at the place where they are thus seized.

U. S. v. *Muller*, 11 Wallace, 263.

It is held that, not only has the Legislature the power to change or destroy the legal fiction—that movables follow the person—but that for the purposes of taxation this legal fiction has no existence.

As to tangible property having an actual *situs*, see *Hoyt* v. *The Commissioners*, 23 N. Y., 224.

As to choses in action.

People v. *Smith*, 88 N, Y., 576.

People v. *Gardner*, 51 Barbour, 352.

Catlin v. *Hull*, 21 Vt., 152.

People v. *Home Insurance Company*, 29 Cal., 533.

State v. *St. Louis County Court*, 47 Mo., 574.

Maltby v. *Reading Railroad Company*, 52 Pa., State, 140.

The case of the State tax on foreign-held bonds, 15 Wallace, 300, is in accord with the above decisions—see in this connection:

Railroad Company v. *Jackson*, 7 Wallace, 262.

Murray v. *Charleston*, 96 U. S., 432.

Railroad Company v. *Collector*, 100 U. S., 327.

See opinion of Justice Bradley in Appendix, 703.

But stock in an incorporated company has an actual *situs*, the location of the corporation.

The owner of stock is not strictly a creditor of the corporation, but is, in common with other stockholders, *indirectly* the owner of the property of the company. In thus becoming a stockholder in the corporation he submits himself to the jurisdiction of the State. In accepting the protection of the laws for his property, in the management and disposition of which he has a voice, he must also submit to such impositions in the way of taxation as the State sees fit to make.

See *Ohio and Mississippi Railroad Company* v. *Wheeler*, 1 Black 286.

Muller v. *Dows*, 94 U. S., 444.

Mr. Wharton says:

"What is the legal seat of a debt? It is clear that this question is entirely distinct from that of the legal seat of a thing that occupies local space. Merchandise, stock in railway or mining corporations, furniture, all have more or less positively a territorial locality. The thing, in this sense, is subject to the law of the place in which it has a continuous lodgment"

Wharton's Conflict of Laws, section 359.

See also Story, Conflict of Laws, section 389, N. 4, 6.

In *Mayor, etc., of Nashville* v. *Thomas*, 5 Coldwell, 604, the Court say:

"Nothing here said is to be understood as implying that shares of stock owned by residents or non-residents, may not be made by legislative enactment, taxable at the place of the corporation of which it is an incident. The contrary opinion, if ever held or expressed in any decision of this court in former years, is obsolete. Such opinion belongs to the age before stocks had become as they now are, common and practicable realities in trade and finance, having a being definite to the perceptions of persons owning or dealing in them, as if invested with the form of physical actuality."

In *Bedford* v. *Mayor, etc., of Nashville*, 7 Heiskell, 412, the Court say:

"Of course we do not say that the Legislature would have the power to tax property, real or personal, in a county or city different from the place where the property is located, but it will be borne in mind that these stocks have in reality no locality; they are not located where the

bank is situated nor have they in reality a locality where the owner resides. It was held in the absence of special legislation upon the subject that they came under the general head of personal property; and as they had no locality on account of the locality of the bank, that they must follow the residence of the owner; but as they had no actual locality at either place, the rule might be changed by legislation upon the subject."

See also *National Bank* v. *Commonwealth*, 9 Wall., 353.
First National Bank v. *Smith*, 45 Ill., 42.
Faxon v. *McCosh*, 12 Iowa, 527.

S. WATSON,
Attorney, and of Counsel for the State of Tennessee.

APPENDIX.

Acts of 1885, Chapter I.

Section 10. That there shall be kept at all times in the office where the business of such bank, banking association, or other corporation organized under the authority of this State, or of the United States, shall be transacted, a full and correct list of the names and residences of all the stockholders therein, and the number of shares and amount of bonds held by each, and such list shall be subject to the inspection of the officers authorized to assess taxes, during the business hours of each day on which business may be legally transacted.

Sec. 11. That if the owner of stocks or bonds in any bank, or banking association, or other corporation organized under the laws of this State, or of the United States, shall not reside in the same county where the bank or corporation is located, or is a non-resident of the State, the revenue collector for the State, county or municipality shall respectively have the power to collect the tax assessed by this Act, by instituting attachment proceedings, and said tax shall be and remain a lien on all the stock or bonds until the payment of the same.

Sec. 12. That for the purpose of collecting such taxes, and in addition to any other laws of this State relative to the imposition and collection of taxes, it shall be the duty of the president or managing officer of every such bank or other corporation, doing business in this State, to retain so much of any dividend or interest belonging to such stockholder or bondholder as may be necessary to pay any and all taxes assessed in pursuance of this Act, until it shall be made to appear to such officers that such taxes have been paid.

Passed April 4th, 1885.

Code Chapter 2, Article IV.

Sec. 1487. The stocks in all private corporations formed under this chapter, or heretofore created, or to be hereafter created by special law, are personal property, and subject to levy and sale as such, the company in each case being required to make the proper entries in its stock or transfer book; but such sale will not relieve a stockholder from liabilities which had attached to him as such previous to the sale; neither will a voluntary sale. (Acts 1849-50. Ch. 75, sec. 24.)

Sec. 3034. The stock in all the turnpikes and railroads chartered in this State shall be deemed personal property, and be subject to levy and sale by execution. (Acts 1857-8. Ch. 163, sec. 14.)

Sec. 3035. The officer making the levy shall, at the time of such levy, or as soon thereafter as practicable, notify the Secretary or other officer intrusted with the books of the turnpike or railroad company, of the fact of such levy; the notice to be given personally or in writing, left at the office of the Secretary, or other officer, as aforesaid. (Ib. sec. 15.)

Sec. 3455. Any person having a debt or demand due at the commencement of an action, or a plaintiff after action for any cause has been brought, and either before or after judgment, may sue out an attachment at law or in equity against the property of a debtor or defendant, in the following cases: 1. Where the debtor or defendant resides out of the State. (Act 1794. Ch. 1, sec. 21; 1836. Ch. 43, sec. 1; 1843-4. Ch. 2, sec. 9.)

Sec. 3478. Where property, choses in action, or effects of the debtor are in the hands of third persons, or third persons are indebted to such debtor, the attachment may be by garnishment. (Act 1794. Ch. 1, sec. 22.

Sec. 3479. Attachment by garnishment is effected by informing the debtor of the defendant, or person holding the property of the defendant, that the property in his hands is attached, and by leaving with him a written notice that he is required to appear at the return term of the attachment, or before a Justice of the Peace at a time and place fixed, to answer such questions as may be asked him touching the property and effects of the defendant. (Ib. sec. 22; 1815. Ch. 20.

SEC. 4283. The creditors, whose execution has been returned unsatisfied in whole or in part, may file a bill in Chancery against the defendant in the execution, and any other person or corporation, to compel the discovery of any property, including stocks, choses in action, or money due to such defendant, or held in trust for him, except when the trust has been created by, or the property so held has proceeded from some person other than the defendant himself, and the trust is declared by will duly recorded, or deed duly registered.

(Act 1832, ch. 11, Sec. 1).

SEC. 4311. The local jurisdiction of the Court of Chancery is also subject to the following rules:

SUB-SEC. 4. Bills against non-residents, or persons whose names or residences are unknown, may be filed in the district in which the cause of action arose, or the Act on which the suit is predicated was to be performed, or in which the subject of the suit or any matereal part thereof is.

(Act 1827, ch. 42, 1833, ch. 52.)

SEC. 4352. Personal service of process on the defendant in the Court of Chancery, is dispensed with in the following cases:

1. When the defendant is a non-resident of the State.

(Act 1833, ch. 4, sec. 3).

SEC. 3500. Attachments may be levied upon any real or personal property of either a legal or equitable nature, debts or choses in action, whether due or not due, in which the defendant has an interest.

SEC. 3524. The attachment and publication are in lieu of personal service upon the defendant, and the plaintiff may proceed, upon return of the attachment duly levied, as if the suit had been commenced by summons.

(Acts 1851–2, ch. 365, sec. 2).

127-129 & 139

SUPREME COURT U.S.
FILED
JAN 15 1886
JAMES H. McKENNEY
CLERK

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1885.

State of Tennessee, Plaintiff in Error,

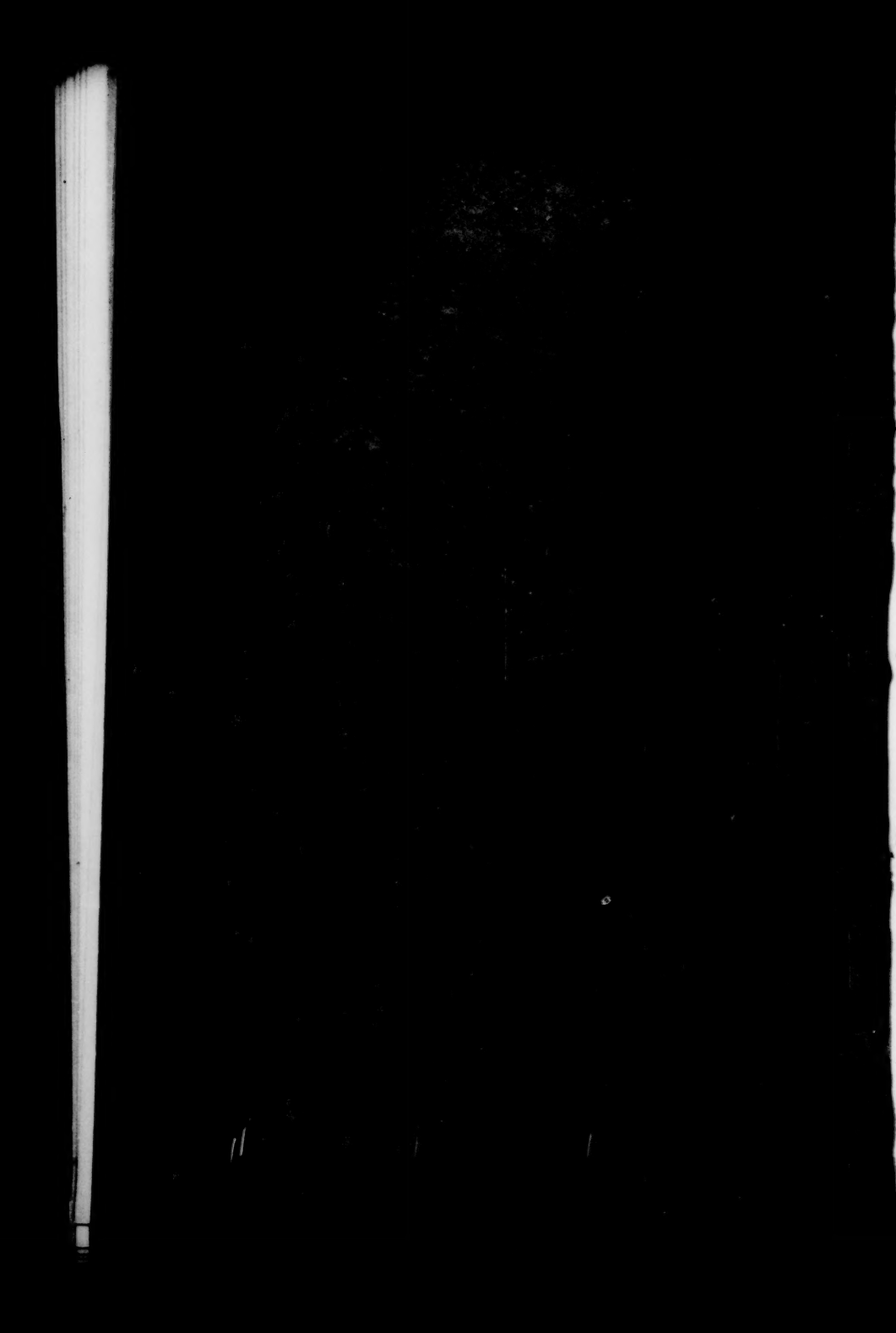
vs.

George K. Whitworth, Trustee of Davidson County, Defendant in Error.

BRIEF OF ED. BAXTER,

Of Counsel for Defendant in Error.

A. D. TAVEL, STATIONER AND PRINTER, NASHVILLE.



UNITED STATES SUPREME COURT.

OCTOBER TERM, 1885.

No. 934.

STATE OF TENNESSEE, PLAINTIFF IN ERROR,

vs.

GEORGE K. WHITWORTH, TRUSTEE OF DAVIDSON COUNTY, DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

On the 23d day of July, 1883, the State of Tennessee, Plaintiff in error, on its own behalf, and upon the relation of Davidson County and the City of Nashville, filed a petition in the Circuit Court of Davidson County, Tennessee, for a mandamus to compel the Defendant, in error, who is Trustee of said County, to assess for taxation in favor of said State, County and City, the shares of stock in the Nashville and Decatur Railroad Company.

In said petition it was insisted that said shares were subject to assessment, not only for the year 1883, but also "for all the previous years since their issuance." Record, pp. 3 and 4. Said shares were issued about 1866, (Record, p. 11); and as the State had never claimed the right to tax them before the petition in this case was filed, they will be liable now, for about nineteen years of back taxes, if the claim of the State, as made in said petition, should be sustained.

Assuming the rate of State, County and Municipal taxation in Nashville to be three per cent. per annum, it would require more than one-half of the par value of the shares to pay the back taxes, as claimed in said petition.

The Defendant in error moved the Circuit Court of Davidson County to dismiss said petition, upon the ground, among others, that said shares of stock were exempt from taxation under the charter of said company; and upon his application, the cause was removed to the Circuit Court of the United States for the Middle District of Tennessee, where he filed an answer, to which the Plaintiff in error demurred. Record, p. 8 to 15. The cause was heard on the 4th day of August, 1884, before Mr. Justice Mathews and Judge Key, by whom it was taken under advisement until October 22, 1884; when the Court adjudged that said shares were exempt from taxation under their charter; that the Plaintiff in error had no right to tax them; and that the petition for mandamus should be dismissed with costs, (Record, p. 16). To reverse said decree, the State of Tennessee has brought the cause to this Court by writ of error.

The claim that said shares of stock are exempt from taxation, is based upon the following state of facts:

On December 11, 1845, the General Assembly of the State of Tennessee, passed an act to incorporate the Nashville and Chattanooga Railroad Company. The 38th section of the charter of said company provides, that "the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, ware-houses and vehicles of transportation, shall be exempt from taxation for a period of twenty years from the completion of the road and no longer." [See Acts of Tennessee, 1845–6, p. 27, sec. 38.]

On January 23, 1852, the General Assembly of Tennessee passed an act to charter the Tennessee and Alabama Railroad Company. The first section of said act, is as follows: "That a body politic and corporate is hereby constituted by the name and style of the Tennessee and Alabama Railroad Company, for the purpose of constructing a railroad from Nashville, by way of

Franklin, to the line between the States of Tennessee and Alabama, in the direction of Florence, in the State of Alabama, and said company shall have all the rights, powers and privileges, and be subject to all the liabilities and restrictions conferred and imposed upon the charter of the Nashville and Chattanooga Railroad Company, and all the various amendments, etc., thereto." [See Acts of Tennessee, 1851–2, p. 93, sec. 1.]

Said company were duly organized under said charter, and constructed a railroad from Nashville to Columbia, with a branch from Columbia to Mt. Pleasant, in the State of Tennessee. Said road was completed on the — day of ——, 1859.

On November 30, 1853, the General Assembly of Tennessee, passed an act to incorporate the Central Southern Railroad Company, and for other purposes.

The 15th section of said act, is as follows: "That a body corporate and politic, is hereby incorporated and constituted by the name and style of the Central Southern Railroad Company, for the purpose of constructing a railroad from a point of intersection with the Tennessee and Alabama Railroad at Columbia, in Maury County, by way of Pulaski, in Giles County, to the Alabama line in the direction of Athens and Decatur, Alabama, to connect with any railroad that may be constructed from Decatur, Alabama, to said State line, in the direction of Pulaski, and the said company shall have all the powers and privileges, and be subject to all the restrictions and liabilities prescribed in the charter of the Nashville and Chattanooga Railroad, and in the various amendments thereunto, except as hereinafter prescribed; provided nothing contained in this section shall be so construed as to require the aid of the State to said road." The exceptions referred to, do not relate to the matter of taxation. [See Acts of Tenn. 1853–4, p. 23, sec. 15.]

Said company were duly organized under said charter, and constructed their road from Columbia, Tennessee, to the line between the States of Tennessee and Alabama. Said road was completed November 20, 1860.

On December 19, 1853, the Legislature of Alabama passed an

act incorporating the Tennessee and Alabama *Central* Railroad Company, for the purpose of constructing a railroad from Montevallo through Decatur and Athens, Alabama, to the line between the States of Alabama and Tennessee, thence to connect with a railroad leading through Pulaski to Columbia, Tennessee.

Section 22 provides "that said railroad company shall have the power to unite and consolidate into one road, all or such part of the said road, with any railroad that may connect with the said Tennessee and Alabama *Central* Railroad, at the Tennessee line, at the point at which the said Tennessee and Alabama Central Railroad may touch said Tennessee line." [See Acts of Alabama, 1853–4, p. 298.] Said company were duly organized in Alabama, under said charter. All of the capital stock of said company that was ever subscribed for, was subscribed for and owned by citizens and residents of the State of Alabama, and none of it was ever subscribed for or owned by any of the citizens or residents of the State of Tennessee. (Record, p. 9.) The road was constructed from Decatur, Alabama, through Athens, to the line between the States of Alabama and Tennessee, and the road with all its property, rights, privileges and franchises, was exclusively within the State of Alabama, and no part thereof was ever within the jurisdiction of the State of Tennessee. Said road was completed in Nov., 1859.

For some time after said three railroads were completed, they were operated as independent roads by their respective companies, and though their aggregate length from Nashville, Tenn., to Decatur, Ala., was only about 122 miles, through passengers were compelled to change cars, and re-check baggage at Columbia, and Pulaski, and through freight had to be re-shipped at those points. (Record, p. 9.) To save the public the expense, annoyance and delay of those changes, the Legislature of Tennessee, on April 19, 1866, passed an act of which the 5th section is as follows:

"That for the purpose of uniting and consolidating the Tennessee and Alabama Railroad Company and the Central Southern Railroad Company into one, the directors of said companies be, and they are hereby authorized to agree upon the terms there-

of, and to adopt all necessary and proper measures, agreements and obligations to effect the same; provided said terms of consolidation when perfected by the directors of said companies shall be submitted to a vote of the stockholders of said companies, and if assented to by a majority of the stockholders, the same shall be binding upon said companies, and that thereafter and upon official report thereof to the Presidents of the respective companies and the Comptroller of the State, said consolidated and united companies shall be known and styled as the Nashville and Decatur Railroad Company, by which name it shall sue and be sued, and be entitled to all the rights and privileges, and be subject to all the liabilities and restrictions of a body corporate."

The 6th section is as follows: "That the said Nashville and Decatur Railroad shall for its government, be entitled to all the rights and privileges, and subject to all the restrictions and liabilities conferred and imposed upon the Nashville and Chattanooga Railroad Company, provided, that no State aid is intended to be extended to said Nashville and Decatur Railroad; provided further, that no new liability to the State of Tennessee is intended to be imposed hereby upon said Tennessee and Alabama Railroad Company, and the Central Southern Railroad Company."

The 7th section is as follows: "That the directors of said Tennessee and Alabama Railroad Company, in maturing the terms of consolidation hereinbefore provided, may adopt such by-laws, rules and regulations, not inconsistent with the laws of Tennessee and the United States, as may be necessary and proper to the successful operation and management of said consolidated company, and may provide in said terms for the discharge of their respective indebtedness so as to bind said consolidated company therefor; provided that nothing in this act shall be construed to alter or affect the lien of the State of Tennessee, for aid heretofore extended to said companies, but the same shall be extended and held as a liability against said consolidated company."

The 8th section is as follows: "That an election shall be held by the stockholders of the Tennessee and Alabama Railroad and the Central Southern Railroad jointly on the first Monday in

May next at the town of Pulaski, in Giles county, for directors for said roads thus combined, who shall be elected in the same manner as is now provided for the Tennessee and Alabama Railroad in its charter, and shall hold their office for one year and until their successors are elected and qualified."

The 9th section is as follows: "That the Tennessee and Alabama Railroad and the Central Southern Railroad thus consolidated, may through their directors thus elected, be consolidated with the Alabama and Tennessee *Central* Railroad upon such terms as may be agreed upon between them and approved by the stockholders of said roads, to be thereafter known as the Nashville and Decatur Railroad—such terms not to be in conflict in any wise with those herein contained, but may be supplemental or in addition thereto, provided, the consolidation herein provided for be approved by act of the Legislature of the State of Alabama heretofore or hereafter passed. And said railroads thus consolidated may by their stockholders regularly convened upon thirty days' notice in the newspapers of Nashville and Huntsville, elect directors to serve them for the term of twelve months, and until their successors shall be elected.

The 10th section is as follows; "That the capital stock of said united companies shall be the aggregate amount of their respective charters with the addition thereto of $———, and that this Act shall take effect from and after its passage." [See Acts of Tennessee, 1865–6, p. 219, 220.]

The consolidation provided for by said statute was approved by an Act of the Legislature of Alabama. [See Acts of Alabama 1866–7, p. 763.] The terms of the consolidation were by appropriate action referred to an executive committee, which committee embodied their suggestions in the form of a resolution, which was as follows: "Resolved, That under the authority delegated to the executive committee by the respective stockholders of the Tennessee and Alabama, Central Southern, and Tennessee and Alabama *Central* Railroad Companies, the committee have agreed that the capital stock of each company shall represent the value of its road, and that therefore each of the companies herein mentioned, shall surrender to the Nashville and De-

catur Railroad Company, all of its rights, franchises, and property; the Nashville and Decatur Railroad Company assuming to pay all debts owing by the several companies, and being hereby especially pledged to protect all persons who have made themselves individually liable for the debts of any of the several companies, and that the stockholders of each company shall be entitled to, and receive credit for, the same amount of stock in the Nashville and Decatur Railroad Company, that they own in any of the several companies; these constituting and comprising the whole basis of settlement." (Record, p. 11.)

On November 21, 1866, at a convention of stockholders of the Tennessee and Alabama, the Central Southern, and the Tennessee and Alabama *Central* Railroad Companies, the resolution aforesaid was unanimously confirmed by the convention, and the three roads were "declared to be united and consolidated under the style of the Nashville and Decatur Railroad." (Record, p. 11.)

On March 8, 1867, the General Assembly of the State of Tennessee passed an Act, the first section of which is as follows: "That the consolidation aforesaid be and the same is hereby as fully confirmed in all respects as if the convention had been held on the first Monday of May, 1866, and that the said consolidation and all acts of said convention be and the same are hereby declared valid." [See Acts of Tennessee, 1866–7, p. 157–8.]

The capital stock of the Nashville and Decatur Railroad Company, as directed by the Acts authorizing and ratifying the consolidation, is made up of the aggregate of the capital stock of the three original companies. The stockholders in those companies surrendered their original certificates, and received as the representatives thereof, certificates for equivalent amounts of stock in the Nashville and Decatur Railroad Company. The capital stock of the last named company, is now owned by various individuals and corporations; about $1,192,500 of it is owned by citizens or residents of Davidson county, Tennessee; while about $717,000 of it is owned by non-residents of the State of Tennessee, who have the certificates therefor in their possession beyond the jurisdiction of said county and State. (Record, p. 11.)

At the time said consolidation was made the stock of the Nashville and Decatur Railroad Company, was comparatively of small commercial value; much, if not most of it, has changed owners; and much of it has changed owners many times since the consolidation; the market value of the stock has changed from time to time, ranging from ten cents on the dollar in 1870, to eighty-five cents on the dollar in 1883, of its par value.

ARGUMENT.

It will be seen from the foregoing statement that the principal questions involved in this case are the following:

First. Was the exemption of the "capital stock" of the Nashville and Chattanooga Railroad Company an exemption of the shares of the individual stockholders, of that corporation?

Second. If it was an exemption of the shares of the stockholders of that corporation, did the stockholders of the Tennessee and Alabama Railroad Company, and of the Central Southern Railroad Company, become entitled to similar exemptions by reason of the fact that those companies, under their charters, were given *all* the *rights*, *powers* and *privileges* of the Nashville and Chattanooga Railroad Company?

Third. If the shares of the stockholders of the Tennessee and Alabama Railroad Company, and of the Central Southern Railroad Company were exempt from taxation in Tennessee by reason of said provisions, in their charters; and if the shares of the stockholders of the Tennessee and Alabama *Central* Railroad Company were exempt from taxation in Tennessee, by reason of the fact that said shares were owned and held exclusively in the State of Alabama, and by reason of the further fact that their road and property were situated in that State exclusively; were the exemptions, which belonged to the shares of said three original companies lost by the union or consolidation of those com-

panies under the name of the Nashville and Decatur Railroad Company.

Fourth. If it shall be decided that the shares of stock of the Nashville and Decatur Railroad Company are not exempt from taxation, and that such of said shares as are held by citizens or residents of the State of Tennessee may be assessed for taxes by the Plaintiff in error, can the shares owned and held by citizens and residents of other States, who have the certificates for such shares in their possession beyond the jurisdiction of the State of Tennessee, be assessed for taxes in that State?

I will discuss the questions in the order in which I have stated them above.

I.

I insist that the exemption of the "capital stock" of the Nashville & Chattanooga Railroad Company was an exemption of the shares of the individual stockholders of said Company.

The "capital stock" as used in that charter, means "the aggregate of the stock made up of the shares of the stockholders," 3. Tenn. Ch. Rep., 616, M. & C. R. R. Co. *v.* Gaines. It is altogether different from the "capital" of the corporation, which is made up of the funds paid in by the stockholders upon their subscriptions, and of funds borrowed by the corporation, or earned in the operation of the road.

The "capital stock" is the individual property of the stockholders; it is divided into shares, certificates for which are issued to the stockholders, as evidences of their ownership of the stock; and these certificates may be sold and transferred by the stockholders, whether the corporation consents to the sale or not.

The "capital" of the corporation is a fund which belongs to the corporation, and not to the stockholders. The legal title to it is in the corporation; and it may be invested or otherwise disposed of by the corporation, whether the stockholders consent to such disposition of it or not.

It will be seen that the Legislature drew a clear distinction between the "*capital stock*" of the company, and the *property* in which the "*capital*" of the corporation was invested. The Legislature understood that the "*capital*" of the corporation would be invested in the construction of the road, with its appurtenances, fixtures and equipments. And while the Legislature provided that the "capital stock" should be forever exempt from taxation, it directed that the road should be exempt for only twenty years from its completion; and all of the other property of the corporation, not immediately connected with the road, was left subject to taxation upon its value, like other property in the State.

In the case of the Memphis & Charleston R. R. Company *v.* Gaines, the Supreme Court of Tennessee, and this Court both decided that the exemption of the "*capital stock*" did not exempt the *road*. [See 97 U. S., p. 707; also 98 U. S., p. 564; R. R. Co., *vs.* Loftin.]

If the road, though built with the "*capital*" of the corporation, was no part of the "*capital stock*," then no other *property* of the corporation, though purchased with its "*capital*," was any part of the "*capital stock*;" and if the road and other property of the corporation, though purchased with the "*capital*" of the corporation, constitute no part of the "*capital stock*," then the "capital stock" must necessarily be something other than, and different from, the *property* of the corporation.

If the exemption of the "*capital stock*" does not exempt any of the *property* of the corporation, it must, if it is to have any operation at all, exempt the *shares* of the stockholders; because the charter shows that the corporation was not expected to have any "capital" except what was invested in its road and other *property*.

Chancellor Cooper in considering the charter of the Memphis & Charleston Railroad Company, which contains precisely the same language, says:

"The only way in which the exemption of these railroad charters can be held to be beneficially operative, is, it seems to

me, by treating the exemption as attached to the *stock of the stockholders.*" [3 Tenn. Chan. Rep., p. 617, Memphis and Charleston R. R. Co. *vs.* Gaines.]

I am aware that the Supreme Court of Tennessee in the cases of the Union Bank *vs.* State, 9 Yerg., 498, and Memphis *vs.* Farrington, 8th Baxter, 546, and this Court in the case of Farrington *vs.* Tennessee, 95 U. S., 686, and Gordon *vs.* Appeal Tax Court, 3 How., 150, have said that the "capital stock" of a *Bank* is distinct from the shares of the stockholders; that the "capital stock" of a *Bank*, is the fund paid into the bank by the stockholders, to be used as the basis of the business of the bank, and the means of conducting its operations. In other words, they construed the "capital stock" of a bank to be synonymous with its "capital;" and for the reason that in the case of *banks*, the "capital" is constituted almost exclusively of the funds paid in by the stockholders upon their subscriptions to the "capital stock."

It had been decided in several cases that the exemption of the "capital stock" of a *bank* was equivalent to an exemption of the property of the *bank* into which the "capital" of the bank had been converted, and in the case of the Memphis and Charleston Railroad Company *vs.* Gaines, 97 U. S., 707, where the charter of a railroad company exempted their "capital stock" from taxation, the decisions which had been made in the bank cases were cited by the railroad company as conclusive that their road and property, at least to the extent that they represented the fund paid in by the stockholders, were as much entitled to exemption as the property of a bank. To this argument the Chief Justice replied as follows: "But in all these cases (meaning the *bank* cases) we think it will be found that the question turned upon the effect to be given the term "capital" or "capital stock," *as used in the particular charter under consideration*, and that when the property has been exempted by reason of the exemption of the capital, it has been because, taking the whole charter together, it was apparent that the Legislature so intended. Thus the "capital stock" of a *bank* usually consists of money paid in to be used in banking, and an exemption of such "capital stock" from taxation, must, almost

necessarily, mean an exemption of the securities into which the money has been converted in the regular course of a banking business." [97 U. S., 707.]

The case of a railroad company is however very different from the case of a bank; for, probably there is not a railroad in the United States which was constructed alone with the funds paid in by the stockholders; in almost every instance the companies have borrowed money upon mortgages, or other securities to enable them to complete their roads. Therefore while the "*capital*" of a *bank* usually consists exclusively of the funds paid in by its stockholders, the "*capital*" of a *railroad company* consists not only of the funds paid in by its stockholders, but also of money borrowed upon mortgages; and therefore while the "capital stock" of a bank may for all practical purposes, be treated as synonymous with its "capital," the "capital stock" of a railroad company cannot be treated as synonymous with *its* "capital;" for as a fact, funds paid in by the stockholders, form but a very inconsiderable part of the "capital" required to construct the road.

Chancellor Cooper says that the phrase "capital stock" "is really used in various senses; that strictly, it is the authorized capital actually subscribed; loosely, it is the fund paid in; still more loosely, it is the capital of the corporation, whether in money or property; and again popularly it is the aggregate of the stock, made up of the shares of the stockholders." He adds, "I have a strong impression, that the words have been used in our railroad charters in the latter sense, and that the exemption was, as the Attorney General argued, intended for the benefit of the stockholders by protecting their shares of stock from taxation." [3 Tenn. Chan. Rep., 616.]

The Supreme Court of Tennessee also concede that the words "capital stock" have no fixed or arbitrary meaning, and they agree with Chief Justice Waite, that the meaning of those words must turn upon the effect to be given to them as used in the particular charter that may be under consideration, taking into view the surrounding and attendant circumstances of that par-

ticular charter. [See 8th Baxter, 545, Memphis *vs.* Farrington; 97 U. S., 707, Railroad Company *vs.* Gaines.]

I will therefore now refer to the language of the charter of the Nashville & Chattanooga Railroad Company, as it is the particular charter under consideration in this case; and I will endeavor to ascertain what is the meaning of the words "capital stock," as employed in the 38th Section of that charter, without regard to what meaning may have been given to those words in the charters of Banks, or of other corporations not involved in this controversy.

II.

There are three terms used in the charter of the Nashville and Chattanooga Railroad Company, the meaning of which must be ascertained, viz: "Capital stock," "stock" and "capital."

The term "capital stock" is used in Sections 2 and 38.
The term "stock" is used in Sections 3, 4, 15, 16, 17 and 30.
The term "capital" is used in Sections 12 and 17.

Section 2 provides, that "books for subscription of sixty thousand shares of the 'capital stock' of said company of twenty-five dollars each, shall be opened on the first Monday in January, 1846," and shall be kept open for a certain time, at certain places, by certain named commissioners.

Section 3 provides, that said commissioners thall receive subscription for "stock" in said company during said time, and on each share so subscribed shall demand and receive the sum of fifty cents.

Section 4 provides, that so soon as the time for receiving subscriptions shall have expired, the commissioners shall forward a correct list of all the subscribers to said "stock," with the number of shares subscribed by each, to a certain board of commissioners, who shall ascertain the whole number of shares taken in the company, and if four thousand shares shall have been subscribed "the said subscribers to the 'stock' shall form a body politic and corporate, etc."

Section 5 provides, that said board of commissioners may receive additional subscriptions until the number of forty thousand shares shall have been subscribed, upon which the company may be formed, "and the subscribers shall thenceforth form a body corporate as aforesaid."

Section 15 provides, that the board of directors may call for the payment of twenty-four and a half dollars on each share of "stock" in sums not exceeding two dollars in every thirty days.

Section 16 provides, that the "stock" of said company may be transferred in such manner and form as may be directed by the by-laws of said corporation.

Section 30 provides, that the profits of the company, or so much thereof, as the Board of Directors may deem advisable, shall, when the affairs of the company will permit, be semi-annually divided among the stockholders in proportion to the "stock" each may hold.

Section 38 provides, that the "capital stock" shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, etc., shall be exempt from taxation for the period of twenty years, etc.

It is manifest from the sections just quoted that the phrase "capital stock," in the language of Chancellor Cooper, is used in its popular sense to mean "the aggregate of the stock made up of the shares of the stockholders." [3 Tenn. Chan. Rep., 616, M. & C. R. R. Co. *vs.* Gaines.]

When Section 2 directs that books for subscription of sixty thousand shares of the "capital stock" of said company of twenty-five dollars each shall be opened, it evidently means that the "capital stock" shall consist of the sixty thousand shares for which subscriptions are to be taken; and that the "capital stock" of the company, in the aggregate, shall consist of those sixty thousand shares.

It is also evident that the term "stock" as used in the charter, is synonymous with "capital stock," or with the shares of the capital stock. Thus, while Section 2 directs that books for

subscription of sixty thousand shares of the "capital stock" of said company shall be opened, Section 3 directs that the Commissioners named in the 2nd section shall receive the subscriptions for the "stock," and shall demand the sum of fifty cents on each share thereof.

Section 4, in requiring that a correct list of all the subscribers to the said "stock," with the number of shares each subscriber has taken shall be furnished, and in providing that the subscribers to the stock shall form a body politic and corporate, etc., clearly shows that in using the expression "subscribers to the stock" it means subscribers to the "capital stock."

Section 15, in authorizing the Board of Directors to call for the payment of $24.50 on each share of "stock," evidently means to authorize a call on each share of the "capital stock."

Section 16, in providing that the "stock" may be transferred in such manner as the by-laws may direct, evidently means that the shares of the "capital stock" may be so transferred.

Section 30, in providing that the profits of the company shall be semi-annually divided among the stockholders in proportion to the "stock" each may hold, evidently means in proportion to the shares of "capital stock" that each may hold.

And Section 38, in exempting the "capital stock" from taxation, evidently means, as Chancellor Cooper intimates, that the shares of the "capital stock" shall be exempt. [M. & C. R. R. Co. *vs.* Gaines, 3 Tenn. Chan. Rep., pp 616 and 617.]

It will be noticed that sections 4 and 5 provide, "that the subscribers to the 'stock' shall form a body politic and corporate;" in other words, that the subscribers to the "capital stock" shall be the "company."

This fact is important, for when we recur to section 38, we find that it is the "capital stock of said *company*" that is exempted. Our opponents will argue that the word "company" means the corporation as distinguished from its stockholders, and that in exempting the "capital stock" of the "company," the Legislature intended to exempt something that belonged to

the corporation as a legal entity, and did not intend to exempt anything that belonged to the individual stockholders; but, as just shown, sections 4 and 5 constitute the individual stockholders—the "company"—and when section 38 exempts the "capital stock" of the "company," it necessarily exempts the stock of the stockholders, who are, in law, the "company."

And as all of the rights, powers and privileges of the Nashville & Chattanooga Railroad Company were expressly conferred upon the Tennessee & Alabama Railroad Company, and the Central Southern Railroad Company, it follows that the subscribers to the "capital stock" of those companies, form the bodies politic and corporate of those companies, and that the exemption of the "capital stock" of those companies means an exemption of the "capital stock" owned by the subscribers or stockholders of those companies.

Section 12 of the charter of the Nashville & Chattanooga Railroad Company provides, "that the Board of Directors shall not exceed in their contracts, the amount of the "*capital*" of the corporation, and of the funds which the company may have borrowed and placed at the disposal of the board."

It is evident that the word "capital" as used in *this* section, means the funds paid in by the stockholders upon their subscriptions; for, it provides, that the contracts shall not exceed the amount of *those* funds together with such *other* funds, as the company may have borrowed and placed at the disposal of the Board.

Section 17 provides, "that said company may at any time, increase its "capital" to a sum sufficient to complete the said road, and stock it with everything necessary to give it full operation and effect, either by opening books for new stock, or by selling such new stock, or by borrowing money on the credit of the company." In *this* section it is evident that the word "capital" has a more enlarged meaning than was given to it in section 12; for, in section 17 it is made to include not only the funds received from subscriptions and sales of stock, but also such funds as may be borrowed by the company: but in both sections 12 and 17, which are the only sections in which the word "cap-

ital," is used, that word has a meaning clearly distinct from the meaning of the phrase "capital stock." The "capital stock" is the stock subscribed by the stockholders, which belongs to them as members of the corporation, and which, under the charter, they may sell and transfer in such manner as their by-laws may direct. The "capital" of the company is to be made up of the funds paid in by the stockholders upon their subscriptions to the "capital stock," or of that fund together with such monies as the company may be able to borrow.

The position of our opponents will force them to give precisely the same meaning to the phrase "capital stock" that the charter gives to the word capital; and yet it is perfectly manifest that the charter gives to those two phrases a distinct and entirely different meaning. When the stockholders paid to the treasurer of the company their subscriptions for the "capital stock," the funds thus paid in by them became a part of the "capital" of the corporation, and together with such other "capital" as might be borrowed by the company, was to be invested in the construction of the road and in the purchase of other property. The road with its fixtures and appurtenances was to be exempt from taxation for twenty years, and no longer. The other property purchased with the "capital" was, from the start, to be taxed at its full value like other property in the State; but the "capita stock" from which part of said capital was derived, was to be exempt from taxation forever. In other words, the State of Tennessee, since the exemption upon the road expired, has taxed every dollar of the "capital" of said company, whether it is invested in the road, or in other property of the company; and whether it was derived from the fund paid in by the stockholders upon their subscriptions, or whether it was borrowed by the company; and to allow the State to tax the stockholders upon their shares of stock, in addition to the tax levied by the State upon the property in which the entire capital of the company is invested, is to give the State of Tennessee a double taxation upon so much of that capital as was paid in by the stockholders upon their subscriptions; and while I am aware that double taxation is not unconstitutional, and that it has been decided that the property of a corporation and the shares of its stockholders may

both be taxed, yet it is well settled that a court will never sustain a claim for double taxation in a case where there is the least doubt in regard to it.

III.

Our opponents refer to the case of the city of Memphis *vs.* Ensley, 6 Baxter 553, as deciding that both the "capital stock" and the shares of stock of a corporation may be taxed. But in that case the court treated the phrase "capital stock" as synonymous with "capital," as it usually is treated in construing the charters of banks and other institutions, whose sole "capital" is derived from the funds paid in by the stockholders upon their subscriptions to the "capital stock." While the case may have been correctly decided upon the particular charter then before the court, it is of little weight in the construction of the charter of a railroad company where a clear distinction is drawn between "capital" and "capital stock," and where the latter is expressly exempted from taxation.

Our opponents also refer to the case of the Gas Light Company *vs.* Nashville, 8 Lea 406. The enacting clause of a statute directed that no tax should be assessed upon the "capital" of any joint stock company; but there was a proviso, that the statute should not be so construed, as to exempt from taxation the real estate of the corporation. The stockholders were assessed upon their shares of stock, and the tax collected. The city then attempted to assess the real estate of the corporation, and the attempt was resisted upon the ground that the real estate, having been purchased with the "capital" of the corporation, ought to be regarded as a part of its "capital," and therefore exempted by the enacting clause of the statute; but the court held, that under the plain terms of the proviso in the statute, the real estate of the corporation was subject to taxation, whether it was to be regarded as part of the "capital" of the corporation or not, p. 409.

In that case there was, in effect, an exemption of so much of the "capital" as was not invested in real estate; but there was no

exemption of the "capital stock;" and therefore there was nothing in the case to call for an opinion as to whether an exemption of "capital stock" is an exemption of the shares of the stockholders.

The case of Van Allen *vs.* The Assessors, 3 Wall., 573, 582, cited by our opponents, decided that the National Banking Law subjects the shares of National Banks, in the hands of shareholders, to taxation by the States, without regard to the fact, that a part, or the whole of the "capital" of the bank, is invested in National securities, which are exempt from State taxation. There was no exemption of either the "capital" or the "capital stock" of the bank, and it was sought to exempt the shares, solely because the "capital," in whole, or in part, was invested in National securities, which were themselves exempt. Surely there was nothing in that case to call for an opinion upon the point involved in this case, viz: Whether an exemption of "capital stock" exempts the shares of that stock.

The case of People *vs.* Commissioners, 4 Wall., 244, was precisely similar to the case of Van Allen *vs.* The Assessors, except that it involved the shares of a State Bank, instead of a National Bank; it therefore requires no separate comment.

In the case of Memphis *vs.* Farrington, 8 Bax., 539, 541, cited by our opponents, the attempt was made to tax the shares of stock in certain Banks and Insurance Companies, the charters of which provided that said institutions should "pay to the State an annual tax of one-half of one per cent. on each share of capital stock, which should be in lieu of all other taxes." The Supreme Court of Tennessee held that the contract of exemption was made with the corporation and not with the stockholders; that upon payment of the annual tax it would be in lieu of all other taxes against the corporation, but it would not be in lieu of other taxes against the stockholders upon their shares. There was no express exemption of the "capital stock" from taxation as there is in this case, and therefore there was nothing to raise the question as to whether an exemption of "capital stock" exempts the shares of that stock.

The point discussed in that case was whether the exemption, such as it was, was intended for the benefit of the corporation alone, or were the stockholders also entitled to be protected by it. The Supreme Court of Tennessee decided that the stockholders were not entitled to the exemption, but this Court decided that they were. 95 U. S., 679, Farrington *vs.* Tennessee.

It is true that both Courts speak of "capital stock" as being distinct from the shares of stock; and say that the exemption of the one does not *necessarily* exempt the other—but even that was said *arguendo* and was not involved in the case. Besides, both Courts were using the phrase "capital stock" as synonymous with "capital," as it is frequently employed in bank charters; and their attention was not called to the distinction between "capital" and "capital stock," which is so clearly defined in the charter now before the Court.

IV.

Our opponents refer to the fact that the Tennessee Revenue Act of February, 1836, while it subjected bank stock to taxation, recognized as exempt the "capital stock" of certain incorporations therein referred to; as an evidence that the Legislature of Tennessee, understood even at that early day, that there was a distinction between "capital stock" and "shares of stock."

They also refer to the fact that the Supreme Court of Tennessee in the case of Union Bank *vs.* State, 9 Yer., 490 (decided in in 1836), recognized the distinction between the "capital stock" of a bank and its shares of stock; as an evidence that the Legislature used the phrase "capital stock" in the charter of a railroad company granted in 1845, in the same sense in which the Supreme Court had construed it, in a bank charter granted in 1832.

They refer to the further fact that the act of Jan. 19, 1844, (passed the year before the Nashville & Chattanooga R. R. Co. were incorporated), directed that "all stock of individual resident stockholders in all the incorporated companies" should be taxed; as an evidence that the Legislature not only understood

that there was a difference between "capital stock" and "shares of stock," but that in granting the charter of the Nashville & Chattanooga R. R. Co., while exempting the "capital stock," they intended that the "shares" should always be taxed.

I have repeatedly conceded that the phrase "capital stock," as used in *bank* charters in Tennessee and elsewhere, has generally been construed as synonymous with "capital;" and of course the exemption of the "capital" of a bank, would not necessarily exempt the shares of its stockholders. I assume that the Legislature of Tennessee was cognizant of the construction which the Supreme Court of that State had placed upon the phrase "capital stock" as used in the *bank* charters of that State, but I deny that they intended that it should be used in the same sense in the railroad charters. The Legislature knew that in the case of banks, the funds paid in by the stockholders upon their subscriptions to the "capital stock," would constitute almost the entire "capital" of the banks, and therefore that the "capital stock," and the "capital" of a bank might well be treated as one and the same thing; but in the case of railroads, the Legislature knew that the funds paid in by the stockholders would probably furnish but a very small proportion of the "capital" that would be needed to build and equip the roads, and therefore, it would never do, in chartering railroads, to restrict the "capital" to the "capital stock," nor to treat them as the equivalents or synonyms of each other.

The fact that the Legislature intended that the phrase "capital stock," as used in the railroad charters, should not be construed as it had been construed in the bank charters, is manifest from the fact, that while shares of bank stock have been taxed in Tennessee ever since the passage of the act of January 19, 1844, so much relied on by our opponents, yet until the petition in this case was filed in 1883, no attempt was ever made by the State to tax the shares of railroad companies whose "capital stock" was exempted from taxation.

Considering how constant and urgent have been the pecuniary necessities of the State, it is impossible to conceive that it would have overlooked for forty years the many millions of dollars in-

vested in railroad shares, while it was all the time taxing bank shares; unless it was because the Legislature understood that the phrase "capital stock," as used in the railroad charters, had a different meaning from what had been ascribed to it in the bank charters; and that an exemption of the "capital stock" of a railroad company exempted the shares of that stock.

V.

Counsel for the State are bound to concede that the Legislature, in enacting that the "capital stock" should be forever exempt from taxation, intended to grant an exemption of *some* thing. When the construction of a precisely similar clause in the charter of the Memphis & Charleston R. R. Co. was before Chancellor Cooper, at Nashville, "the Attorney General of the State argued that the exemption was intended for the benefit of the stockholders by protecting their shares of stock from taxation." [3 Tenn Chan. Rep., 616, M. & C. R. R. Co. *vs.* Gaines.] The Chancellor accordingly held that the exemption did not protect the road, notwithstanding all the funds paid in by the stockholders upon their subscriptions to the "capital stock" had been used in the construction of the road; and his decree was affirmed, both by the Supreme Court of Tennessee, and by this Court. [97 U. S., 707, Railroad Companies *vs.* Gaines.]

The State having succeeded in that case, in securing the taxation of the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, was content to recognize the correctness of the Attorney-General's argument; and from 1878, when that case was decided in this Court, until 1883, when the petition in this case was filed, the State made no attempt to tax the shares of the stockholders.

The State has, however, now concluded to repudiate the argument of its Attorney-General; and the counsel now representing the State, deny that the exemption was intended for the benefit of the stockholders, and insist that not only shall the road, with all the other property of the company, be taxed, but that the shares of the stockholders shall also be subjected to taxation by the State.

They are met, however, with the same difficulty which confronted the Attorney-General; viz: To explain what was meant by the charter exemption of the "capital stock" forever.

They first say, as I understand them, that the "capital stock" is the fund paid to the corporation by the shareholders, and is the exclusive property of the corporation;" that the whole of this fund was invested in the road; that the Legislature in reality intended to "declare that the property in which the capital stock was invested, should for the purposes of taxation, represent the capital stock;" but, the Legislature having failed to declare that intention in express terms, this Court, "acting on the principle that the presumptions are against exemptions, declared the whole property subject to taxation; refusing to make any distinction between property bought with capital stock, and that bought with borrowed money." In other words, they put this Court in the attitude of holding that though the Legislature did declare, in express terms, that the capital stock should be exempt from taxation forever, yet, as it was not also declared in express terms, that the property in which the capital stock might be invested, should represent it for the purposes of taxation, the capital stock could not be exempted at all.

I respectfully submit that this Court made no such decision. They did not decide that the "capital stock" of the company was not exempt from taxation. That question was not, in any way, before them. The railroad company, in that case, claimed that "the exemption of the 'capital stock' from taxation, was equivalent to an exemption of the *property*, purchased with, or represented by the capital," 97 U. S., p. 707; but this Court held, that as the charter expressly provided, that the road, and other enumerated property, should be subject to taxation after twenty years from its completion, it could not have been understood that the enumerated property was to represent the capital for the purposes of taxation. The Court did not attempt to even define the meaning of the phrase "capital stock" as used in the charter—much less to decide that it was not exempt from taxation. All that the Court decided was, that as the road and other property was exempt for only twenty years, it could not, for the purposes

of taxation, represent the "capital stock" which was to be exempt forever.

As to what *did* represent the "capital stock," for the purposes of taxation, or as to what was intended to be exempted as capital stock, the Court expressly declined to decide. Their exact language is as follows: "Without pursuing this subject further, it is sufficient to say, that we are clearly of the opinion that the road, with all its fixtures, etc., was taxable after March 28, 1877, *and that, whatever else was exempted as capital stock, this was not.*" 97 U. S. pp. 708, 709.

In other words, instead of holding, as counsel claim, that the perpetual exemption of the "capital stock" had failed, because the Legislature had neglected to declare in express terms, that the property in which it was invested, should represent it, for the purposes of taxation; this Court held that as the road and property was exempt for only twenty years, it could not represent for the purposes of taxation, the "capital stock," which was to be exempt forever. In saying "*tha whatever else was exempted as capital stock*, this (the road) was not," the Court, so far from deciding that nothing was exempt as capital stock, gave at least an intimation, that something else, other than the road, *was exempt* as "capital stock" under the charter. And as the road, with all the other property of the corporation is now subjected to taxation, there is nothing else to represent the exemption of the capital stock, except the shares of that stock now held by the stockholders of the corporation.

The next explanation of the perpetual exemption of the "capital stock," vouchsafed by counsel for the State, is, that instead of exempting the shares of the stockholders, it was only intended to exempt the corporation from the payment of a *privilege* tax; that a corporation may be taxed for the *privilege* of carrying on its business, notwithstanding its property, and the shares of its stockholders, may both be taxed *ad valorem*; that a tax on the "capital stock" of a corporation, is in the nature of a *privilege* tax; and that an exemption of the "capital stock," is therefore nothing but an exemption of the corporation from such *privilege* tax.

They say that "such a tax is not a property tax, but an arbitrary imposition without regard to the value of the thing taxed; and they suggest that it was to secure protection from such unrestrained exactions that the company stipulated for the perpetual exemption of its "capital stock."

This explanation or suggestion of counsel is unsatisfactory, for several reasons.

First: When a corporation is taxed on its nominal capital, the capital is referred to as a measure of the price to be paid for the franchise; and the tax, though it be in the nature of a privilege or license tax, is in effect the same as a tax on the *franchise*. Burroughs on Taxation, p. 174, sec. 87; p. 166, sec. 85. 1 Desty on Taxation, p. 305.

If, therefore, the exemption of the "capital stock" of a company is an exemption of the company from a privilege tax, it necessarily exempts the company from a tax on its franchise. But the State of Tennessee has taxed the railroads upon their franchises ever since the exemptions upon their roads expired. The Act approved March 20, 1875, declaring the mode and manner of valuing the property of a railroad company for taxation," expressly declares that "the franchises of the corporation" are one of the four elements of taxable property belonging to the corporation; and the assessors in valuing the property of the corporation are required "to have in view, and look to the franchises." [See Acts of 1875, pp. 100, 101, L. & N. R. R. Co. *vs.* Bate, 12 Lea, 581.]

Surely the Legislature would not continue to tax a railroad company upon the value of its franchises, if they understood that an exemption of the "capital stock" was an exemption from privilege taxes; which, as above shown, are the same in effect as *franchise* taxes.

Second. A privilege tax need not be measured by the capital, or capital stock; it may be measured by the gross or net earnings of the company, the length of its road in the State, or by any other arbitrary standard. If, therefore, the State should

levy a privilege tax upon a railroad company, measured by the earnings, or mileage, the fact that the State had exempted the "capital stock" would be no defense. The State would reply that the privilege tax claimed was not laid upon, nor measured by, the "capital stock," and therefore was in nowise affected by an exemption of such stock.

I think that notwithstanding the ingenious arguments and suggestions of our opponents, this Court will conclude with Chancellor Cooper that "the only way in which the exemptions of these railroad charters can be held to be beneficially operative, *is by treating the exemption as attached to the stock of the stockholders.*" 3 Tenn. Ch. Rep., 617, M. & C. R. R. *vs.* Gaines; 22 Fed. Rep., 75, State *vs.* Whitworth, Trustee.

VI.

The next question in this case is this: If the charter of the Nashville & Chattanooga Railroad Company exempted the shares of the stockholders of that corporation, did the stockholders of the Tennessee & Alabama Railroad Company, and of the Central Southern Railroad Company, become entitled to similar exemptions by reason of the fact that those companies under their charters were given all the rights, powers and privileges of the Nashville and Chattanooga Railroad Company? The Tennessee & Alabama Railroad Company are given by their charter "*all* the rights, powers and privileges of the Nashville & Chattanooga Railroad Company." [See Acts of 1851–2, p. 93, Sec. 1.]

The Central Southern Railroad Company are given by their charter "*all* the powers and privileges of the Nashville & Chattanooga Railroad Company." [See Acts of 1853–4, p. 23.]

The question then, is, if the charter of one railroad company gives them *all* the rights, powers and privileges of another company, and the capital stock of such other company is exempt under their charter, is the "capital stock" of the first company exempt?

Webster defines the noun privilege thus:

"*Lat. privilegium;* an ordinance or law against, or in favor of an individual; from *privus*, private; and *lex*, law. A peculiar benefit or advantage; a right or *immunity* not enjoyed by others or by all; special enjoyment of a good or *exemption* from an evil or burden" * * * "Privilege among the Romans, was something conferred upon an individual by a private law; and hence it denotes some peculiar benefit or advantage, some right or *immunity* not enjoyed by the world at large."

He defines the verb privilege thus:

"To grant some particular right or *exemption* to; to invest with a peculiar right or *immunity*, as to privilege representatives from arrest; to privilege the officers and students of a college from military duty."

"To bring or put into a condition of privilege or *exemption* from evil; to *exempt;* to deliver."

Crabbes' English Synonyms give this definition:

"Privilege, in Latin *privilegium* compounded of *privus* and *lex*, signifies a law made in favor of any individual or set of individuals."

"Privilege and prerogative consist of positive advantages; exemption and immunity of those which are negative; by the former we obtain an actual good, by the latter the removal of an evil."

"Privilege in its most extended sense comprehends all the rest, for *every* prerogative, *exemption*, and *immunity*, are *privileges*, inasmuch as they rest upon certain laws or customs, which are made *for the benefit of certain individuals.*"

Abbott's Law Dictionary says: "The vernacular sense and the ordinary meaning in common law use are nearly the same, viz.: a right or *immunity* held by way of exception to the general law; a peculiar or personal authority or *exemption*, something *held in virtue of a private or individual law* as it were; that which is granted or allowed to any person or any class of persons, either against or beyond the course of the common law."

Bouvier's Law Dictionary, Title *privilegium*, defines it as "a private law inflicting a punishment or conferring a reward." *

* * "Every privilege granted by law in derogation of common right."

Brown's Law Dictionary says:

"*Privilegium*, sometimes used in law for a place which has some special *immunity;* and sometimes for an *exemption* from the rigor of the common law."

Burrill's Law Dictionary gives this definition:

"Privilege (from Latin *Privilegium*) an *exemption* or *immunity* from some general duty or burden, a right peculiar to some individual or body; according to its etymology, a law, or provision or exception of law, in favor of an individual (*quasi priva* or *privata lex*). A peculiar right or favor granted by law contrary to the common rule."

"The word 'rights' is generic, common, embracing whatever may be lawfully claimed. Privileges are *special* rights belonging to the individual or class, and not the mass. Properly an *exemption* from some duty, an *immunity* from some general burden or obligation; a right peculiar to some individual or body." [See Paschall's Annotated U. S. Constitution., p. 225.]

In discussing the privileges and immunities of citizens of the United States, Justice Washington says: "An *exemption from* higher *taxes* or impositions than are paid by the other citizens of the State, may be mentioned as some of particular *privileges* and *immunities* of citizens, which are *clearly embraced by the general description of privileges* deemed to be fundamental. [Paschall's Annotated U. S. Constitution, p. 226.]

In the case of the P. & W. Railroad Company *vs.* Maryland 10 Howard, 376, it appeared that the charter of the Delaware & Maryland Railroad Company contained an exemption from taxation; that this company were consolidated with the Wilmington & Susquehanna Railroad Company, and then this company were consolidated with the Baltimore & Port Deposit Railroad Company, who had no exemption in their charter. The name of this last consolidation was the Philadelphia, Wilmington & Baltimore Railroad Company.

The court say that though the law provided that the P., W. & B. Railroad Company should be entitled to all the *privileges* and advantages belonging to the original companies, yet as those companies held their corporate *privileges* under different charters, the evident meaning of the provision was, that whatever *privileges* or advantages either of them possessed should, in like manner be held and possessed by the new company to the extent of the road they had respectively occupied before the union; that it should stand in their place and possess the powers, rights and privileges they had severally enjoyed in the portions of the road which had previously belonged to them. It followed that as the original Baltimore & Port Deposit Railroad Company had no exemption in their charter, the consolidated company could claim no exemption upon that part of their consolidated line; but as the charter of the original Delaware & Maryland Railroad Company did contain an exemption from taxation, and as the law under which the consolidation took place, gave to the consolidation the "property rights and *privileges*" of the original company—the court held that "the original *exemption*, therefore, of the Delaware & Maryland Railroad Company, as far as it went, was extended to the Wilmington & Susquehanna Railroad Company, and had been continued to the plaintiffs in error. It is true that the question actually before the court was, as to the taxability of the Baltimore & Port Deposit Railroad, and not as to the taxability of the Delaware & Maryland Railroad, but the very principle upon which they decided that the former was liable—necessarily decided that the latter was exempt. See 10 How., 393, 394. At all events the decision is of value as concurring with the above cited authorities in their definition of the word "privilege."

The case of Tomlinson *vs.* Branch, 15 Wall., 460, was in many respects similar to the one last cited. The South Carolina *Canal and* Railroad Company who had an exemption from taxation for 35 years, were consolidated with the South Carolina Railroad Company, who had a perpetual exemption from taxation. The Court held that the perpetual exemption in the charter of the latter company, could not be extended to the property originally owned by the former, which became taxable upon the

expiration of the 35 years originally granted to it; but that the former company were entitled to the exemption of the latter company so long as it lasted.

The syllabus is, that "where a railroad company by its charter, was granted such an exemption for a limited period, and was afterwards merged in another railroad company, which became invested with all its *property, rights and privileges*, the *exemption* and its limitation *accompanied* the property and (but ?) a perpetual exemption from taxation in the charter of the latter company would not be extended to the property so acquired without express words or necessary intendment to that effect."

"Where two railroad companies are consolidated, the presumption is that each of the two united lines of road will be respectively held with the *privileges* and burdens originally attaching thereto unless the contrary is expressed."

The facts in the case of the Chesapeake & Ohio Railroad Company *vs.* Virginia, 94 U. S., p. 718, were these:

An act was passed to incorporate the Covington & Ohio Railroad Company with an exemption from taxation. Afterwards another act was passed authorizing the Covington & Ohio Railroad Company to consolidate with the Virginia Central Railroad Company; the consolidated companies constituting one corporation, to be known as the Chesapeake & Ohio Railroad Company; the consolidated company to have "all the *rights, privileges and franchises and property*, which might have vested in either company prior to the act of consolidation. The consolidation never took place, but under an alternative provision in the same statute, the Virginia Central Railroad Company were authorized to contract with the Commissioners of the Covington & Ohio Railroad Company, for the construction of that road from Covington to the Ohio river; and in the event such contract was made, the Virginia Central Railroad Company, were to be thereafter known as the Chesapeake & Ohio Railroad Company, and were to be entitled to all the benefits of the charter of the Covington & Ohio Railroad Company, and to all the *rights, interests and privileges*" which by the act were conferred upon the Chesapeake &

Ohio Railroad Company when organized. At the time said act was passed, the Virginia Central Railroad Company were operating a road from Richmond to Covington, which had no exemption from taxation. They entered into the contract contemplated, and built the road from Covington to the Ohio, river and assumed the name of the Chesapeake & Ohio Railroad Company. The Court held that the Chesapeake & Ohio Railroad Company were entitled to all the "rights, interests and privileges" which would have belonged to the consolidated company had the consolidation taken place; and that the consolidated company would have possessed whatever privileges and advantages either of the original companies had possessed, to the extent of the road occupied by each. That it would have stood in their place and have possessed "the powers, rights, privileges and immunities, the constituent companies had severally enjoyed in the portions of the road which had previously belonged to them." (See pp. 724–5–6.) An attempt was made to tax the real and personal property of every description of the Chesapeake & Ohio Railroad Company. The company claimed that the entire road from Richmond to the Ohio river was exempt. The Court decided against them, so far as the road between Richmond and Covington was concerned, but as to the road between Covington and the Ohio river, the exemption was conceded.

The case of the Southwestern Railroad Company *vs.* Georgia, 92, U. S., (2 Otto,) 676, *in note*, was this: The Southwestern Railroad Company, chartered in 1845, with an exemption from taxation beyond one-half of one per cent. of its annual net income, was united with the Muscogee Railroad Company, a company entitled to a similar *exemption*. The union was effected under an act of the Legislature of 1856, the effect of which was to extinguish the Muscogee Company by its merger in the Southwestern. No new corporation was created by the union of the two companies; but the powers of the Southwestern were enlarged, and all the *rights, privileges and property* of the Muscogee Railroad Company became the rights and property of the Southwestern. The Court held that the *exemption* from taxation which both companies enjoyed under their original charters could not be withdrawn by the Legislature.

This is a direct decision, that where the "rights, privileges and property" of one railroad company (the Muscogee) are conferred upon another (the Southwestern), the latter is entitled to the benefit of an exemption from taxation which belonged to the former.

State *vs.* Betts, 4 Zabriskie Rep., 556, was this: The original charter of the Morris Canal and Banking Company authorized the construction of a canal from the Delaware to the tide waters of the Passaic, and contained an exemption from taxation. By a supplemental act of the Legislature, the company were authorized to continue the canal to the Hudson river, and "all *rights, powers and privileges*" granted by the original act were conferred on them for this purpose in the same manner, and to the same effect as if the said company had been originally authorized by said act to construct their canal to the Hudson, etc.

The court (p. 557) say, "the supplement authorizing the extension of the canal, confers on the company the same *privileges* granted to it in and by the original charter. *The term privilege includes in its ordinary definition an exemption from such burthens as others are subjected to, as the privilege of being exempt from arrest or from taxation.* The Legislature manifestly intended by the language of the supplement to grant to the company the same exemption they would have enjoyed if the authority to continue the canal to the Hudson had been embraced in the original act and in the same terms."

The case of Humphrey *vs.* Pegues 16 Wall., 244, was this: An act of a State Legislature passed in 1851 to incorporate a railroad company, contained no exemption from taxation, but an act passed in 1855 to amend its charter, did exempt it.

In 1863 an act was passed conferring on a company which had been incorporated in 1849 to build a railroad, but which had never yet found inducements sufficient to make it build the road, "*all the powers, rights and privileges*" granted by the charter of the first-named road:

Held, That the property of the second road was made by the act of 1863 *exempt from taxation*, and that the Legislature could not repeal the act of 1863 so as to make it subject to taxation.

The court say (p. 247) "all the privileges, as well as powers and rights, of the prior company were granted to the latter. *A more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined. It contains the essential idea of a peculiar benefit or advantage of a special exemption from a burden falling upon others.*" Again, they say on p. 249, "We are not advised what other powers and privileges were then and there conferred upon it in addition to the exemption we are considering. But this exemption was conferred; an exemption that must have been understood by the least reflecting person as being of immense value to all concerned in the road."

It is true, that the Supreme Court of Tennessee, in the case of Wilson, Receiver, *vs.* Gaines, Comptroller, 2 Legal Reporter p. 31, use this language: "In the case of Humphrey *vs.* Pegues, 16 Wall., to which we are referred as authority against our conclusion in the former opinions of this court, *the meaning of the term privilege is not discussed* (?) a reading of the report shows clearly that it *was in no way brought to the attention of the court*, and was in fact *not involved*." But with all respect to the Supreme Court of Tennessee, I confidently submit that the meaning of the word privilege, *was* brought to the attention of the court in Humphrey *vs.* Pegues; that it was discussed by counsel; was directly involved in the issue; and expressly decided by the court.

Mr. D. H. Chamberlain's brief (16 Wall., 246) shows that he argued that "an exemption from taxation was never to be implied; that nothing less than a clear intention on the part of the Legislature, expressed in terms which admit no other reasonable construction, would suffice to sustain a privilege so valuable and so far reaching, etc., etc. He also argued that the statute ought to be confined to such privileges, etc., as were necessary "for the purpose of organizing and forming the company," and it was doubtless in answer to this argument that the court replied when they said, "we are not advised what other powers and privileges were conferred in addition to the exemption we are considering, but this exemption was conferred," etc., p. 249.

It was impossible for the court to have held that the second company were exempt from taxation, without holding that such exemption was embraced by the words "powers, rights and privileges;" and therefore the meaning of each and all those words was directly in issue in that case.

The Supreme Court of Tennessee in Wilson, Rec'r, *vs.* Gaines *supra*, seem to think that the case of Humphrey *vs.* Pegues was overruled by this Court in Morgan *vs.* Louisiana, 93 U. S., p. 217; but this is manifestly an error. All that was decided in Morgan *vs.* Louisiana, was that a sale of the property and *franchises* of a railroad corporation, under a decree founded upon a mortgage, which in terms covers the *franchises*, immunity from taxation upon the property of the company, provided in the act of incorporation, does not accompany the property, in its transfer to the purchaser.

The mortgage did not cover the *privileges* of the company, and no attempt was made to sell the privileges. The court say (on p. 221), the question presented is whether under the designation of *franchises* the immunity from taxation passed to the purchaser, etc. On p. 223, they say the *franchises* of a railroad corporation are rights or privileges, *which are essential to the operations of the corporation*, and without which its road and works would be of little value; *such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines and the like.* They are *positive* rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them," (*i. e.*, the *franchises*).

We have never claimed that the word *franchises* embraced an immunity from taxation. But we claim that the word "privilege" does; we say the word *privilege* embraces *all* the *private* rights given by a charter to a corporation, and which are not enjoyed by the community at large. These private rights in a charter, may be *positive*, such as the right to run cars, to take tolls, to appropriate land, etc., and then they are called *franchises*, if they are essential to the operation of the road; or they may be negative, as an exemption from taxation or military duty, and

then they are called immunities. Every *private* right secured by *special* law, is a *privilege*, whether it be positive or negative in character, or whether it be a franchise or an immunity in name. The grant to one company of the *positive* privileges of another (*i. e.* the franchises) would not carry the *negative* privileges (*i. e.* the exemptions or immunities). This is all that is decided in Morgan *vs.* Louisiana. But where *all* the privileges of one company are granted by the State, to another, it carries not only the *positive* privileges, such as *franchises*, but also the *negative* privileges, such as exemptions and immunities, and this is exactly what is decided in Humphrey *vs.* Pegues.

The case of Humphrey *vs.* Pegues decides that a grant of the whole, is a grant of all the parts. The case of Morgan *vs.* Louisiana, decides that a grant of one part (the positive), is not a grant of another part (the negative). Clearly there can be no conflict between two such decisions, and Mr. Justice Field, who delivered the opinion in Morgan *vs.* Louisiana, certainly regarded them as in strict accord. On p. 224 he says *immunity* of particular property from taxation *is a privilege* which may sometimes be transferred under that designation (*i. e.* the designation of *privilege*), as held in Humphrey *vs.* Pegues, 16 Wall., 224. *All that we now decide* is that such *immunity is not* itself *a franchise* of a railroad corporation which passes as such (*i. e.* as a *franchise*), without other description to a purchaser of its property." [See 93 U. S., p. 224, Morgan *vs.* Louisiana.]

The case of Railroad Companies *vs.* Gaines, 97 U. S., pp. 711–712, has also been cited against us, but it was only a repetition of the case of Morgan *vs.* Louisiana. The Knoxville & Charleston Railroad Company, *for the purpose of making and using their road were* invested with all the powers, rights and privileges of the Nashville & Chattanooga Railroad Company.

The court say, "*in Humphrey vs. Pegues*, 16 *Wall.*, 224, *we held that the grant to one company of* ALL *the powers, rights and* PRIVILEGES *carried with it an exemption from taxation*; but in Morgan *vs.* Louisiana, (93 U. S., 217), that such an exemption did not pass by sale of the *franchises* of a railroad company. In the last case Mr. Justice Field speaking for the court said, "the *fran-*

chises of a railroad company are rights or *privileges which are essential to the operations of the corporation, and without which its road and works would be of little value,* such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines and the like. They are positive rights and privileges, *without the possession of which the road of the company could not be successfully* worked. Immunity from taxation is not one of them." "This seems to us conclusive of the case. The grant here was *not* of ALL the rights and *privileges* of the Nashville & Chattanooga Company, but of such *as were necessary for the purpose of making and using the road,* or in other words, the *franchises* of the company, which do not include immunity from taxation."

In the case of Railroad Company *vs.* Georgia, 98, U. S. pp. 360–361, it appeared that there were two railroad companies incorporated by the State of Georgia, one of them under the name of the Savannah, Albany & Gulf Railroad Co., and the other under the name of the Atlantic & Gulf Railroad Company. The charter of each of those companies contained a grant "of all the rights, privileges and immunities" which had been granted to the Central Railroad & Banking Company, and to the Georgia Railroad Company, or to either of them. Each of these latter companies held by their charter, the "privilege or immunity" of not being subject to be taxed higher than one-half of one per cent. upon their annual net income in the one case, and in the other on the net proceeds of their investment. Upon this state of facts, this Court held, that the Savannah, Albany & Gulf Railroad Company, and the Atlantic & Gulf Railroad Company, "severally acquired by their charters, an exemption from taxation at any higher rate or in any different manner, and such an immunity they severally continued to hold down to 1863. This (say the court) we think admits of *no reasonable doubt.*"

It will be noticed from the quotation, that the Court treat the words "privileges" and "immunities" as synonymous, and they hold that where one company are given all the rights, privileges and immunities of another, which other have an exemption from taxation in their charter, the former are entitled to a similar exemption *beyond any reasonable doubt.*

In the case of Railroad Company *vs.* Commissioners, (103 U. S., p. 4), the Court say, "that an exemption from taxation" * * * "*is undoubtedly a privilege;* but, not a privilege necessary to the *construction, repair or operation* of a railroad."

In the case of Louisville & Nashville Railroad Company *vs.* Palmez, 109, U. S., 252, the Court use this language: "It admits *no doubt*, we think, if the Pensacola & Louisville Railroad Company were entitled to this exemption (meaning an exemption from taxation), and if the legislative grant of authority to make and accept this assignment of it, was valid and effective, that the right to be exempt from taxation according to its terms passed to the Pensacola Railroad Company. But it must be borne in mind that it must be taken to have vested in the latter, if at all, precisely as it had in the former, that is, as a personal *privilege.*

I submit that this is a clear affirmation of the principle that an exemption from taxation is a privilege.

In the case of Memphis Gas Light Company *vs.* Shelby County (109, U. S., 399), it appeared that the charter of the Memphis Gas Light Company, referred "for the rights, privileges, powers and restrictions of that company," to certain sections of the charter of the Nashville Gas Light Company, and it was insisted that the charter of the last named company contained an exemption from taxation. The Court use this language: "For any contract of exemption from taxation, we must therefore look to the provisions of those sections in the charter of the Nashville Company." The Court held that the Nashville charter did not contain any exemption from taxation, and therefore that the Memphis charter contained none. But it is manifest that the Court proceeded upon the assumption, that if the Nashville charter had contained an exemption from taxation, the Memphis Company would have been entitled to the same exemption, in as much as it was vested with all the rights, privileges, powers and restrictions of the Nashville Company.

In Louisvile & Nashville Railroad Company *vs.* Gaines, 3 Fed. Rep., 266, the question was thoroughly examined, and all

of the authorities carefully reviewed by his Honor, Judge Baxter, who decided that, "where one railroad company is incorporated with the rights, powers and privileges of a pre-existing company, the new company acquire an exemption from taxation guaranteed to the former."

His Honor again examined the question, and decided it in the same way, in E. T., V. & G. R. R. *vs.* Pickard, Comptroller, 24 Fed. Rep., p. 614.

And the decision of Mr. Justice Mathews and Judge Key was to the same effect in this case in the Court below. State *vs.* Whitworth, 22 Fed. Rep., p. 81.

The case of the Memphis Railroad Company *vs.* Commissioners, 112, U. S., 609, may be cited against us upon this point The opinion of the Court in that case was announced by Mr. Justice Mathews, who presided at the hearing of this case at Circuit.

His exact language is, that *an "exemption from taxation, must be construed to have been the personal privilege of the very corporation, specifically referred to,* and to have perished with that, unless the express and clear intention of the law, requires the exemption to pass, as a continuing franchise, to a successor." p. 617.

It will be seen that the case in effect sustains the case of Humphrey *vs.* Pegues; and decides that an exemption from taxation is, as I contend, a "privilege." The exemption from taxation contained in the charter of the Nashville & Chattanooga Railroad Company was therefore "the personal *privilege*" of that company; and the Tennessee & Alabama Railroad Company, and the Southern Central Railroad Company, having been given by their respective charters *all* the *privileges* of the Nashville & Chattanooga Railroad Company, it follows, that each of those companies became entitled to a similar exemption from taxation. Whether those exemptions perished, when those companies were afterwards united, or consolidated, under the name of the Nashville & Decatur Railroad Company; or whether "the express and clear intention of the law," under which their union took place, allowed the exemptions to pass to, or be enjoyed by, the

Nashville & Decatur Railroad Company, is a question which I will discuss further on. The only proposition which I am *now* discussing is that "an exemption from taxation, contained in a railroad charter, is one of the *privileges* of that corporation, and the case cited of Memphis Railroad Company *vs.* Commissioners, 112 U. S., on pg. 617, *expressly says that it is.*

The case of the St. Louis, etc., Railway Company *vs.* Berry, 113 U. S., 465, may be cited against us upon this point. The opinion of the Court in that case also, was delivered by Mr. Justice Mathews. The charter of the Cairo & Fulton Railroad Company contained an exemption from taxation, and when the charter was granted, the constitution of the State contained no restriction upon the power of the Legislature to grant such exemptions. The charter also authorized the company to consolidate with another, but before the consolidation took place, the State Constitution was changed so as to prohibit the granting of irrepealable charters, and to ordain that the property of corporations.thereafter created, should forever be subject to taxation, the same as property of individuals. The Court held that the consolidated corporation did not come into existence until after the new constitution took effect, and that it could only acquire "such powers and *privileges*" as at the time when the consolidation was made, it was within the power of the State to confer, and lawful for the new corporation to accept. But it was said that if the right to consolidate, contained in the charter, had been acted upon before the constitution was changed, "it might well be that all the powers and *privileges*, originally conferred in the charter of the Cairo & Fulton Railroad Company, *including the exemption in question*, would have vested in the new company," pp. 475, 476. I submit that the language quoted is a clear recognition of my proposition that an exemption from taxation is included in the "privileges" of a corporation, and is in affirmance of the case of Humphrey *vs.* Pegues.

The case of Chesapeake & Ohio Railway Company *vs.* Miller, 114 U. S., 176, will also be cited against us upon this point. The opinion in that case also, was announced by Mr. Justice Mathews.

An Act of the Legislature of West Virginia passed March 1, 1866, authorizing the incorporation of the Covington & Ohio Railroad Company contained in its 7th section an exemption from taxation. Afterwards, the Legislature, by act passed Feb. 26, 1867, authorized the consolidation of that company with several other Railroad Companies, the consolidated company to be known as the Chesapeake & Ohio Railroad Company, and to be vested with all the rights, *privileges*, franchises and property, which may have been vested in either company, prior to the consolidation. The consolidation never took place; but under an alternative provision in the same statute, the Legislature authorized the Virginia Central Railroad Company to contract with the Covington & Ohio Railroad Commissioners, for the construction of the railroad from Covington to the Ohio river; and in the event such contract should be made (as it afterwards was made), the said Virginia Central Railroad Company should be known as the Chesapeake & Ohio Railroad Company, and should be entitled to all the benefits of the charter of the Covington & Ohio Railroad, and to "all the rights, interests and *privileges*," which by said act were conferred upon the Chesapeake & Ohio Railroad Company.

Upon this state of facts the Court say, on page 182, "that it was not denied or disputed, but that the Chesapeake & Ohio Railroad Company, by virtue of its organization as a corporation under the act of March 1, 1866, became entitled to the exemption from taxation secured by sec. 7 of that act."

But the Chesapeake & Ohio Railroad Company could not have become entitled to the exemption from taxation secured by sec. 7 of the act of March 1, 1866, if the exemption had not passed under the words "rights, interests and *privileges*" contained in the act of Feb. 26, 1867. It is clear therefore that it was not even denied in that case, that as a general proposition where one corporation is, by its charter, given "all the rights and *privileges*" contained in the charter of another, the former acquires any exemption from taxation, that the charter of the latter may contain." The case cited therefore does not shake the authority of Humphrey *vs.* Pegues; but recognizes its correctness, as well as

the correctness of the decision previously rendered by this Court when the attempt was made to tax the Chesapeake & Ohio Railroad Company upon that part of the road which lies in Old Virginia ; a decision to which I have referred above, 94 U. S., 718, 724, *et seq.*, Chesapeake & Ohio Railroad Company *vs.* Virginia.

In the case of Chesapeake & Ohio Railroad Company *vs.* Miller, 114 U. S., 176, it further appeared that the Chesapeake & Ohio Railroad Company completed the road from Covington to the Ohio river ; but in the course of its construction it became necessary to make several mortgages of the road, to secure a large amount of bonds, which mortgages were foreclosed by sale of the road; and the purchasers, in pursuance of a statute of West Virginia then in force, became a corporation under the name of the Chesapeake & Ohio Railway Company ; and under that name, *as such purchasers*, claimed the benefit of the exemption contained in the original act incorporating the Covington & Ohio Railroad Company.

The purchasers based their claim upon certain statutes of West Virginia, passed Feb. 18, 1871, and Feb. 20, 1877, which provided that upon such a sale of a railroad, the debtor company should be *ipso facto* dissolved ; that the purchaser should forthwith be a corporation by any name he might select ; and that the corporation so created should succeed " to all such franchises, rights and privileges, and perform all such duties, as would have been had, or should have been performed by the first company." (p. 181.)

The purchasers claimed that under the words "franchises, rights and privileges" they had acquired the exemption from taxation contained in the original charter ; but broad, general and comprehensive as the language was, the Court said that they could not, "*in reference to the subject matter then in hand*," apply it with that force and meaning. (p. 185.)

The Court refer to the peculiar circumstances of the case, then before them, as evidencing that whatever meaning might, be attached to such language in ordinary cases, the history of that

road, and of the legislation connected with it, showed that the Legislature did not intend that the benefit of the exemption should ever enure to the purchasers of the road.

The State had already sunk a large amount of money in an incomplete, and therefore unprofitable public work, which it was desirous to induce private capitalists to finish, and to that end was willing to cede them the property itself, and the franchises of a railroad connected with it, and by way of further inducement, to exonerate the property in their hands from all burdens of taxation, until the investment yielded them a profit, equal to ten per cent. upon the capital invested. The Court thought that the only persons whom the State had in contemplation as the beneficiaries of the exemption, were those who were willing to risk their money in an enterprise, the future of which could only be regarded as doubtful; that the exemption was not intended to benefit the creditors of the company, nor the purchasers of the road; that the State had no motive to aid the creditors in foreclosing their mortgages, and received no benefit from the sale of the road, to the purchasers, who were claiming the exemption from taxation. The Court were, therefore, of opinion that the exemption in that case was intended to be strictly personal to the original corporation; that it protected the property only so long as it continued to be the property of that corporation; that it had no element of assignability in it; that it was not intended that it should pass to the purchasers; and that "all the franchises, rights and privileges" which the purchasers were to acquire at the sale, were those necessary "to provide suitable means of incorporating the purchasers, to facilitate their use of the property, in operating it for the benefit of the public, as designed from the beginning." (pp. 183, 184, 185, 186).

It is easy to see that the facts of that case make it just the opposite of the one now before the Court; and that upon reversing the reasoning of the Court, so as to make it applicable to the facts of this case, would make that case a strong authority in our favor. The State of Tennessee was desirous of having a line of railroad built from Nashville to the coal, iron and cotton fields of Alabama, and thence to the cities on the Gulf. The State had

no money to invest in the road, but was desirous to induce private capitalists to construct it, and to that end was willing, not only to cede them the usual franchises connected with railroads, but by way of further inducement, was willing to exonerate the property of the corporations from taxation for twenty years, and the shares of the stockholders forever.

The proposition of the State was accepted, and the charters of the Tennessee and Alabama Railroad Company and the Central Southern Railroad Company were granted, expressly giving those companies all the rights and privileges contained in the charter of the Nashville and Chattanooga Railroad Company, which charter, as was well known, contained an exemption from taxation, which the State and all of its counties and towns, had punctiliously respected from the moment it was granted, and which they were then respecting, when the other two charters were granted.

I again say that the facts of this case were totally unlike the facts in the case of Chesapeake and Ohio Railway Company *vs.* Miller; that the Court did not in that case intend to question the authority of Humphrey *vs.* Pegues; and they in effect say so on page 184, when they say that "*the circumstances of the case distinguish it from that of Humphrey vs. Pegues*, 16 Wall., 244."

VII.

The Supreme Court of Tennessee, in the case of Wilson, Receiver, *vs.* Gaines, cited above from 2 Legal Reporter, p. 30, feeling the force of the authorities relied upon by us, say that "however comprehensive a meaning may have been given to the term privilege by the courts of other States, or by lexicographers, we are constrained to use it in the restricted sense and meaning given to (it in) our own laws, and especially by the constitution of the State. That it was not intended or understood to be sufficient by the framers of our Constitution of 1834, to embrace exemptions, is made clear and indisputable by reference to section 7 of Art. XI. of that instrument, by which it is ordained, "the Legislature have no power to pass any law granting to any indi-

vidual or individuals rights, privileges, immunities or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law, provided always the Legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good."

"A Legislature acting under this Constitution for its powers, and as defining its duties, must be exclusively presumed to have used a word or term of the Constitution, in the sense and with the meaning given it by that Constitution."

The argument is that the solitary clause quoted from the Constitution of 1834, uses the terms "privilege" and "exemption" to perform distinct offices, and to convey different meanings, and therefore Acts of the Legislature passed twenty years afterwards, must be presumed to have used the word privilege as having a meaning different from exemption.

With the utmost respect for the Supreme Court of Tennessee, we submit that the rule of construction adopted by them is manifestly erroneous.

First. The charters under which the stockholders of the Nashville and Decatur Railroad Company claim in the case at bar are not only statutes but contracts, and contracts on the faith of which they have expended vast sums of money, and incurred heavy responsibilities. One well settled canon of construction, as well of contracts as of statutes, is that they are to be read according to the "*natural* and obvious import of their language." Words are to be taken in their *ordinary* grammatical sense, without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation. [Sedw. Stat. & Con. Law, p. 260].

The stockholders were told by all the standard authorities that the obvious and natural meaning of the word "privilege," embraced an immunity from taxation; in fact, this Court had said that "a more important or more comprehensive privilege than a perpetual exemption from taxation can scarcely be imagined." [16 Wall., 247]. And after the stockholders have invested their

money on the "natural" and "ordinary" meaning of the word as given by the courts of other States, or by lexicographers, it will not do for the Supreme Courte of Tennessee, "by a subtle and forced construction," to limit its meaning to the restricted sense in which it is found in a single clause of the Constitution of that State.

Second. Even when construing a single statute or contract, Vattel says: "It does not follow either logically or grammatically, that because a word occurs in a sentence with definite sense, therefore, the same sense is to be adopted in every sentence in which it occurs." [Sedw. Stat. and Com. Law, 264.]

And Mr. Story adds that it does not follow that, because a word is found in one connection in a constitution with a definite sense, therefore the same sense is to be adopted in every other connection in which it occurs." Mr. Cooley commenting on this language, says that while as a general thing it is to be supposed that the same word is used in the same sense wherever it occurs in a constitution, yet the rule is one of presumption merely, its force is but slight, and it must readily give way to a different intent appearing in the instrument. [Cooley, Con. Law, p. 62.]

Mr. Story gives many instances where, in the National Constitution, the same word is very plainly used with different meanings. [See Story, Constitution, sec. 454.] And no better instance can be afforded than the Constitution of Tennessee in its use of this very word privilege.

Art. XI., sec. 7, quoted above by the Supreme Court, prohibits the Legislature from passing any law granting to any individual or individuals, rights, privileges, immunities or exemptions, other than such as may be by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law." The word "rights" is here used in a generic sense, embracing whatever may be lawfully claimed;" the word "privileges" is used to designate special rights belonging to the individual or class, and not to the mass. Rights are usually based upon general laws—privileges upon special or private laws. [Paschal's Annotated Const., p. 225.]

Immunities and exemptions may rest upon general or special laws. The exemption of certain property from execution, rests upon a general law; the exemption of the property of a particular corporation from taxation, rests upon a special or private law.

The Constitution did not intend to draw a distinction between privileges on the one hand and exemptions and immunities on the other, but to ordain that whether exemptions and immunities were claimed as "rights" under a law general in its form, or as "privileges" under a law confessedly special or private, they should be unavailing unless the law be such as may be extended to any member of the community who may be able to bring himself within its provisions. The result of this would have been to have prohibited the formation of all private corporations; and this is why the proviso was added, that "the Legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good."

Article X., section 2, ordains that members of the Legislature shall take an oath that they will not assent to any bill, etc., that shall have a tendency to abridge the "rights and privileges" of the people. Here again the word "rights" is used to designate that which is common to the mass—while the word "privileges" is used to designate what is peculiar to an individual or a class.

Article II., sec. 28, authorizes the Legislature to tax "privileges." In this place the word is used to designate any occupation which cannot be legally followed except under license.

Article I., section 30, ordains that no hereditary emoluments, *privileges* or honors, shall ever be granted or conferred in this State. Article I., sec. 15, ordains that the *privilege* of the writ of *habeas corpus* shall not be suspended unless, etc.—and Art. I., sec. 8, ordains that no man shall be disseized of his freehold, liberties or *privileges* unless by judgment of a jury, etc. In these three sections it is manifest that the word privilege is used in the sense of prerogative.

Article II., section 13, ordains that Senators, etc., shall be *privileged* from arrest, etc., and Art. IV., section 3, ordains that

electors shall be *privileged* from arrest, etc. It is clear that the word is here used in the sense of an exemption or immunity.

We see then that the Supreme Court of Tennessee is mistaken; and that the word "privilege" has no fixed definite meaning even in the Constitution of Tennessee. That while it is always used to denote something personal or peculiar to the individual or class—as contra-distinguished from "rights" based upon general laws, common to all, yet it may be positive—as the privilege to sue out a *habeas corpus*, or negative, as the exemption or immunity from arrest. It is difficult to see why an exemption from arrest is a privilege, and yet an exemption from taxation is not.

VIII.

From an inspection of the Statutes of Tennessee, it will be found that exemptions from taxation were expressly granted in the charters of the Nashville & Chattanooga Railroad Company and the Memphis & Charleston Railroad Company, which were passed in 1845–6, and contained over thirty sections each; that they were among the first railroads chartered in Tennessee, and for brevity sake the charters of most of the companies subsequently incorporated, simply refer to one of the older charters and give to the new companies the same rights, powers and privileges. Neither the State of Tennessee, nor the counties, nor cities of the State, ever claimed the right to tax the stock of any of these roads until 1883, and in the meantime some of the stock has changed hands many times, and probably all of it has changed hands several times.

It is respectfully submitted that this practical construction of the meaning of the word "privilege" as embracing an exemption from taxation continuing for nearly forty years, is entitled to great, if not, controlling weight. [1 Legal Rep., 343–4, K. & O. R. R. Co. *vs.* Hicks; 9 Wall., 54, Chicago *vs.* Sheldon; 16 How., 524, Irwin *vs.* U. S.]

Whatever may be the respect of this Court for the opinion of the Supreme Court of Tennessee, yet this Court must decide for

itself, independent of the decision of a State Court, whether there is a contract, and whether its obligation has been impaired. [109 U. S., 256, L. & N. R. R. Co. *vs.* Palmez.]

IX.

If my argument up to this point be sound, it has established that at the date of the consolidation above referred to, the shares of the stockholders of the Tennessee & Alabama Railroad Company, and of the Central Southern Railroad Company, were exempt from taxation in Tennessee by reason of the exemptions contained in the charters of those companies granted by that State.

The stockholders of the Tennessee and Alabama *Central* Railroad Company were exempt from taxation in Tennessee, not by reason of any contract in the charter of that company, which was granted by the State of Alabama, but by reason of the fact that that the road and all the property of that company situated exclusively in the State of Alabama, and all the shares of the stock of that company were owned and held by citizens of the State of Alabama, who were beyond, and not within the jurisdiction of the State of Tennessee.

We have the case, therefore, where the shares of stock in all three of the original companies, were, at the date of the consolidation, exempt from taxation in the State of Tennessee; and the next important question is whether those stockholders have forfeited that exemption and rendered their stock liable to taxation in Tennessee by reason of their consenting to the union and consolidation of those companies under the corporate name of the Nashville & Decatur Railroad Company.

No new powers, rights, privileges, immunities or advantages were conferred upon them, or upon the consolidated company. All that they gained by the consolidation was a reduction in the number of their officers, and consequently in the operating expenses of the line.

It was not the case of railroad wreckers, who had purchased as

a speculation the road or charter of an insolvent company, seeking to swell the profits of their venture, by securing the benefit of an exemption from taxation, which the State had conferred upon the original company, as an inducement to get them to embark their capital in the hazardous undertaking of building a railroad; but it was where the original companies themselves, who had risked their fortunes to build their roads as required by their charters, and who were therefore the special objects which the State had in view when the exemptions were granted, were asking to be allowed to unite themselves under one corporate name, in order to reduce their expenses, and to facilitate the business of the country entrusted to their care.

Neither was it the case where one railroad company, whose property or stock was not entitled to exemption from taxation, was trying to acquire an exemption by going through the forms of a consolidation with another company, in whose charter such an exemption happened to be found; but it was a case where neither one of the companies were subject to taxation by the State, and all they were asking, was to be allowed to increase their efficiency as public carriers, by consolidating their operations under one organization, and thereby economize the scanty resources which the war had left them.

Neither was it the case where a powerful and grasping corporation, by acquiring a majority of the stock of a weaker one, had obtained the control of it, and then fraudulently used that control to force a consolidation, in order to obtain the benefit of an exemption which the charter of the weaker company happened to contain.

The companies in this case dealt with each other upon terms of perfect equality, and nothing but the utmost fairness and good faith characterized their negotiations with each other, or with the State. Their proposed action was freely and openly considered by the stockholders of each company, and it was believed by all the companies that their union would be a wise and happy one. The consent of their Parent States was dutifully sought, and as graciously given. The banns of matrimony were publicly proclaimed in the statutes of the realm; and bene-

dictions followed their triple marriage, in the legislative acts which ratified and confirmed their alliance.

The State of Tennessee and the public generally, received very material benefits and advantages in the reduction of rates, which the reduction of expenses enabled the through line to afford; and in the saving of the delay, expense and damage which had previously resulted from the two changes at Columbia and Pulaski, in the freight and passenger business of the line.

It was not the case of one of two competing railroad companies consolidating with the other for the purpose of stifling competition between them; but it was the case of three short roads, capable of forming a continuous and connected line, which every consideration of sound public policy, demanded should be placed under one harmonious and efficient management.

The State of Tennessee obtained another very important and valuable advantage from the consolidation. At the time it was made, the Tennessee & Alabama Railroad Company owed the State $1,173,000, and the Central Southern Railroad Company owed the State $596,000, in bonds of the State, loaned to those companies respectively by the State, and secured by a lien reserved in the act of February 11, 1852, which was before this Court in the Tennessee Bond cases, 114 U. S., 663. Neither of said companies were responsible for the bonds loaned to the other, and while the loan to the Tennessee & Alabama Railroad Company amounted to over $26,000 per mile, the loan to the Central Southern Railroad Company amounted to only $17,000 per mile. The Tennessee and Alabama *Central* Railroad Company, incorporated by Alabama, were not liable for the debts of either of the other companies to the State of Tennessee, and were not themselves indebted to said State at all.

Under the 7th section of the act of April 19, 1866, authorizing the consolidation, it was expressly stipulated, that said lien of the State of Tennessee should "be extended, and held as a liability against said consolidated company." By this arrangement, the debt of the State, by being extended over 122 miles of road, was reduced from $26,000 per mile upon the Tennessee & Alabama Railroad, and from $17,000 per mile upon the Cen-

tral Southern Railroad, to an average of only $14,500 per mile, upon the consolidated road.

Instead of having separate liens upon two short local roads, of no strategical importance, the State fastened its debt upon a road 122 miles long, running from the capital of the State to the Tennessee River. No one at all acquainted with the history of the railroad companies, to whom bonds were loaned by the State of Tennessee, under the Internal Improvement System of 1852, will believe for a moment, that the State could ever have collected its debts against the Tennessee & Alabama Railroad Company, and the Central Southern Railroad Company, by a sale of their roads. As it was, however, the consolidated company paid the State every dollar of said indebtedness, with interest in full to date of payment.

Surely there can be no equity, no moral justice, in the claim of the State of Tennessee that a mere union or consolidation of the three companies, which enured as much, if not more, to the benefit of the State, than it did to the benefit of the stockholders of the companies, had, concealed within it, the fearful consequence of subjecting the stock of those companies to an onerous taxation by the State and by all its counties and incorporated towns; a taxation which is not only to continue from this time henceforth forever, but is to reach back through a period of nearly twenty years; and which at the heavy rates of taxation imposed, especially by the counties and incorporated towns, will amount to a practical confiscation of the entire stock of the companies.

I sincerely trust that this Honorable Court will not allow any strained or technical construction to accomplish such an unjust result. The various persons who have bought and sold this stock during the last twenty years, dealt in good faith, relying upon the construction which the authorities of the State of Tennessee and all its counties and incorporated towns, had placed upon their own taxing powers. They had been led by those authorities to believe that the stock was exempt from taxation; and this claim of the State, so recently and so fiercely asserted, struck upon their ears like a fire bell at night.

The Act of April 19, 1866, authorizing the consolidation, was passed as it states in Section 5, "for the purpose of *uniting* and consolidating" the original companies. It declares that said "consolidated and *united* companies" shall be known and styled the Nashville and Decatur Railroad Company.

It authorizes in Section 8 the stockholders of the "said roads thus *combined*, to elect a Board of Directors;" and in Section 10 it provides that the capital stock of said *united* companies shall be the aggregate amount of their respective charters, etc. [See Acts of 1865–6, pp. 218, 219, 220.]

We see then that the primary object of the Legislature was not to extinguish or destroy the original companies, "but to unite and combine" them together under one corporate name. From this alone it would be fair to presume that after they were united and combined, they would retain under their new name all the rights, powers and privileges which they had respectively held and enjoyed before their union; and in providing that the capital stock of the "united" companies should be the aggregate amount of their respective charters, it would seem that the Legislature intended that the capital stock of the original companies should be simply added together to make up the aggregate capital stock of the combination. There is nothing whatever in the Act authorizing the consolidation, to indicate that the Legislature intended to change the character of the capital stock of either of the companies, or to deprive the stock of any privilege or immunity that it may have originally possessed.

In Tomlinson *vs.* Branch, this Court say that "where two railroad companies are consolidated, *the presumption is* that each of the two united lines of road, will be respectively held with the privileges and burdens originally attaching thereto, unless the *contrary is expressed*." See 15 Wall., 460, Tomlinson *vs.* Branch.

Certainly there is nothing expressed in the Act of April 19, 1866, to indicate that the State of Tennessee intended to deprive the united companies of any right or privilege that they may have enjoyed before they were united.

Again in the County of Scotland *vs.* Thomas, 94 U. S., 690, this court say that "where a consolidation is effected between two railroad companies *and nothing to the contrary is indicated*, the rights and privileges, as well as the duties and liabilities, of each, continue to exist as before, in the hands of the new organization."

In the case of Green County *vs.* Conness (109 U. S., 106), this court refer to and approve the case of Tomlinson *vs.* Branch, and repeat the proposition that "when two companies are authorized to consolidate their roads, *it is to be presumed* that the franchises and privileges of each continue to exist in respect to the several roads so consolidated."

I insist that the stockholders of the Nashville & Decatur Railroad Company are entitled to the benefit of this legal presumption, and that the burden is upon our opponents to show that there is something in the Act authorizing the consolidation, which indicates that the State of Tennessee intended to deprive the stock of the exemption which it had previously enjoyed.

In the case of Green County *vs.* Conness, just cited, the statute gave authority to consolidate "upon such terms as may be deemed just and proper," and this court held that such authority included the power to transfer to the consolidated company, the franchises and privileges connected with the road, even if the statute itself had not had that effect. [See 109 U. S., p. 106, Green County *vs.* Conness.]

The Act passed April 19, 1866, provides "that for the purpose of uniting and consolidating the Tennesse & Alabama Railroad Company and the Central Southern Railroad Company into one, the directors of said company be and they are hereby authorized to agree upon the terms thereof, and to adopt all necessary and proper measures, agreements and obligations to effect the same. [See Acts of 1865–6, p. 218, Sec. 5.]

It further provides "that the Tennessee & Alabama Railroad and the Central Southern Railroad Companies thus consolidated, may, through directors thus elected, be consolidated with the

Tennessee & Alabama *Central* Railroad Company upon such terms as may be agreed upon between them, and approved by the stockholders of said road." [See Acts of 1865–6, p. 219, Sec. 9.]

The power thus given to those companies to agree upon the terms upon which they would be united or consolidated, included under the authority of the case just cited, "the power to transfer to the consolidated company the franchises and privileges" connected with the original companies.

Under the power thus given them by the Legislature of Tennessee, the original companies did agree upon the terms of consolidation, and among other things they agreed that "each of the companies should surrender to the Nashville & Decatur Railroad Company all of its rights, franchises and property," and that the "stockholders of each company should be entitled to, and receive credit for, the same amount of stock in the Nashville & Decatur Railroad Company that they owned in any of the several companies."

On the 8th of March, 1867, the Legislature passed an Act fully confirming the consolidation in all respects. [See Acts of 1866–7, p. 158, Sec. 1.]

We thus see that the right of exemption from taxation which belonged to the capital stock of the Tennessee & Alabama Railroad Company and of the Central Southern Railroad Company under their respective charters, was, by the sanction and consent of the Legislature of Tennessee, transferred to the Nashville & Decatur Railroad Company, and that after such transfer was made, the Legislature of Tennessee confirmed the transfer in all respects.

The Act of April 19, 1866, which authorized the consolidation to be made, expressly provides, "*that no new liability to the State of Tennessee is intended to be imposed hereby upon said Tennessee & Alabama Railroad Company and said Central Southern Railroad Company.*" [See Acts of 1865–6, p. 219, Sec. 6.] I have already stated that by the 7th section of said Act, the lien which

the State held upon the roads of those two companies, was extended as a liability against the consolidated company; but with the exception of said lien, the State did not wish to place any new burden whatever upon said companies, or their stockholders.

The provision just quoted from the 6th section, therefore corrobates the view I have already taken of the general object and purpose of that statute, viz: That its object was to permit the original companies to be united or combined together, without intending to deprive them of any of their then existing rights or privileges, and without intending to impose any new liability upon them.

How can it be argued by our opponents that no new liability was imposed upon the companies by the consolidation, if their capital stock which was exempt from taxation before the consolidation, is now, by reason of the consolidation, to be rendered liable to taxation? It seems to me that the liability which our opponents are seeking to enforce in this case, is not only a new liability, but one that is most important and far-reaching in its consequences.

Is it not remarkable that the State should have been so careful to preserve, and even extend, its lien, and yet not provide for the surrender of the exemptions from taxation, which were well known to be contained in said charters? It cannot be said that the State was not aware of the exemptions, or that their validity was not recognized by the State; for up to the date of said consolidation the State had never taxed said roads, nor the shares of their stockholders.

Neither can it be attributed to the ignorance or carelessness of the Legislature; for in the general statutes, afterwards passed, authorizing the consolidation of railroads, the State was careful to stipulate that no exemption from taxation should ever pass to the consolidated company. [Acts of Tennessee, 1877, ch. 72, Sec. 3, p. 92.]

Up to the time the Act of April 19, 1866, was passed, spe-

cially authorizing the consolidation of these companies, the Legislature was authorized by the Constitution of Tennessee, to grant exemptions from taxation, and it had been the policy of the State, for forty years, to grant such exemptions in almost every railroad charter that was passed. But when the general statute of 1877, in regard to the consolidation of railroads, was enacted, the State had closed out its interest in the railroad companies, to whom State bonds had been loaned, and the Constitution had been changed, so as to prohibit all future exemptions from taxation. It will thus be seen that the difference between the Acts of 1866, and 1877, in regard to exemptions from taxation, was due, not to oversight, but to a marked change of State policy; and therefore that the failure of the State in 1866 to demand a surrender of the exemptions from taxation, was due to the fact, that the State preferred to continue them as an inducement to forming a consolidation, which would result not only in securing the State's debt beyond doubt, but also in establishing an important through line of railway, in which the public were greatly interested.

X.

Section 5 of the Act passed April 19, 1866, enacts that "for the purpose of uniting and consolidating the Tennessee and Alabama Railroad Company, and the Central Southern Railroad Company into one," the Directors of said company might agree upon the terms thereof, etc., and that "said consolidated and united" companies should be known and styled the Nashville & Decatur Railroad Company, by which name "it shall sue and be sued, and be entitled to all the rights and privileges, and be subject to all the liabilities and restrictions of a body corporate."

Section 6 is as follows: "That said Nashville and Decatur Railroad shall, for its government, be entitled to all the rights and privileges and subject to all the restrictions and liabilities conferred and imposed upon the Nashville and Chattanooga Railroad Company; *provided*, that no State aid is intended to be extended to said Nashville and Decatur Railroad; and pro-

vided further, that no new liability to the State of Tennessee is intended to be imposed hereby upon said Tennessee and Alabama Railroad Company and the Central Southern Railroad Company."

When we remember that the Tennessee and Alabama Railroad Company and the Central Southern Railroad Company, thus consolidated, were entitled under their respective charters to all the rights and privileges of the Nashville and Chattanooga Railroad Company, it is manifest that the object of the Legislature in providing that the Nashville and Decatur Railroad Company should have all the rights and privileges of the Nashville and Chattanooga Railroad Company, was but to state in another form, that the original companies should, under their consolidated name, have all the rights and privileges, to which they were entitled under their original charters, viz: All the rights and privileges of the Nashville and Chattanooga Railroad Company. In a word, the Legislature said to them, "Inasmuch as you have now, under your original charters, all of the rights and privileges of the Nashville and Chattanooga Railroad Company, you shall continue to have the same rights and privileges when you are consolidated under the name of the Nashville and Decatur Railroad Company; you shall continue to have all of the rights and privileges of the Nashville and Chattanooga Railroad Company, except that you shall have no additional State aid, and the lien of the State for the aid heretofore given you, shall be extended as a liability against the consolidated company."

Our opponents will cite the cases of Knoxville and Charleston Railroad Company *vs.* Gaines, (97 U. S., 711,) and Railroad Company *vs.* Commissioners (103 U. S., page 4). In those cases it was held, that where a railroad company is "for the purpose of making and using its road," or is, "for the purpose of constructing and repairing its road," invested with all the rights, powers and privileges of another company, it acquires only such of said rights and privileges as are necessary for the purpose of making and using, or constructing and repairing its road, and our opponents will argue that inasmuch as Section 6 of the Act of April 19, 1866, enacts that the Nashville and Decatur Railroad Com-

pany shall, for its government, be entitled to all the rights and privileges of the Nashville and Chattanooga Railroad Company, it will take under that grant only such of said rights and privileges as are necessary to enable it to govern its corporate affairs.

Our opponents wholly misconceive the meaning of the phrase "for its government." It was not intended by the Legislature in Section 6, to give to the Nashville & Decatur Railroad Company only such rights and privileges as were necessary to enable it to govern its corporate affairs, *because in Section 5 of the same act it had already been provided that said company should be entitled to all the rights and privileges of a body corporate.* Now, if under the operation of Section 5, the company had already been invested with all the rights and privileges of a body corporate, surely it had under *that* section all the rights and privileges that would be necessary for governing its corporate affairs, and it was not necessary to give the company the same power again in Section 6.

The fact that Section 6 did not intend to restrict the Nashville & Decatur Railroad Company to such privileges only as were necessary to enable it to govern its corporate affairs, is demonstrated by the fact that that section contains the proviso, that no State aid is intended to be extended to said company; because, if the Legislature intended to restrict the privileges to such as were necessary for the government of the corporate affairs of the company, why be so careful to provide that the company should not be entitled to State aid? Surely State aid was not a privilege necessary to enable the company to govern its corporate affairs, any more that an exemption from taxation would have been necessary for that purpose. The very fact that the Legislature took occasion to provide that the company should not be entitled to the right or privilege of additional State aid, shows that it understood that the company were to get, not only such of the rights and privileges of the Nashville & Chattanooga Railroad Company, as were necessary for the government of their corporate affairs, but that they were to get *all* of those rights and privileges of whatever character they might be, and that they might have acquired even the right and privilege to additional

State aid under the Internal Improvement system of 1852, had it not been excluded by that express proviso.

It is manifest that the word "government" in Section 6, if it was intended to have any special significance whatever, was used in its sense of regulation or control by the State; that it was intended to indicate the extent of governmental regulation reserved by the State over the affairs of the corporation; and that it had no reference whatever to the government by the corporation of their own corporate affairs; the State, and the original companies were contracting in regard to what should be the rights and duties of the consolidated company, and as to how far the State should have a right to interfere in their affairs. The meaning of Section 6 is precisely the same as if it were written as follows: "That the said Nashville & Decatur Railroad Company shall for their regulation and control, be entitled to all the rights and privileges, and be subject to all the restrictions and liabilities, conferred and imposed upon the Nashville & Chattanooga Railroad Company." In other words, the State in authorizing the union of the two companies under a new name, knowing that each of them already possessed under their respective charters all the rights and privileges of the Nashville & Chattanooga Railroad Company, intended to enact in Section 6, that under their consolidated name they should continue to be regulated, governed and controlled by the same charter provisions—that is, that they should continue to have all of the rights and privileges of the charter of the Nashville & Chattanooga Railroad Company on the one hand, and on the other that they should continue to be subjected to all the restrictions and liabilities imposed by that charter. In order however, that there should be no mistake upon either side, it was especially provided that the consolidated company should not be entitled to additional aid from the State, and on the other hand, that the State would impose no new liability upon either of the original companies.

XI.

Our opponents contend that the three original corporations consolidated under the name of the Nashville & Decatur Rail-

road Company were, by the consolidation, dissolved; that a new corporation was thereby created which took all of its immunities, franchises and privileges, under the *sixth section* of the Act of April 19, 1866, by which the consolidation was authorized; that the *sixth section* did not give to the consolidated company any of the rights or privileges of the original companies, nor any of the rights and privileges of the Nashville & Chattanooga Railroad Company except such as were necessary for the proper government of its affairs. To support this contention they rely upon Shields *vs.* Ohio, 95 U. S., 319; R. R. Co., *vs.* Maine, 96 U. S., 499, R. R. Co., *vs.* Georgia, 98 U. S., 359; and St. Louis, etc., Railway *vs.* Berry, 113 U. S., 465.

Those cases may be regarded as authority for the proposition that, as a *general rule*, when two or more corporations are consolidated they are thereby dissolved; that their powers and faculties do not *ordinarily* pass to the consolidated company by transmission; and that the consolidated company is *usually* a new and distinct corporation, which takes everything by creation or grant, as distinguished from transmission, and therefore acquires only such powers and faculties as may have been designated in advance, in the *Acts* authorizing the consolidation, 95 U. S., 323.

This, however, is quite a different proposition from that announced by counsel. In searching for the powers and faculties of the Nashville & Decatur Railroad Company, we are by no means restricted to the *sixth section* of the Act of April 19, 1866; but we may look to the scope and tenor of the entire Act, and to the general purpose and intention of the Legislature as reflected by the light of circumstances surrounding the Legislature at the time. We also have the right to look to all the statutes referred to in the Act of April 19, 1866; for as said by this Court in Shields *vs.* Ohio, the language of a consolidating statute "may be made operative by reference" to the charters of the original companies, 95 U. S., 323.

Again: while it is true that the *usual* effect of a consolidation is to dissolve all the original corporations, yet such is not the case in all instances; for as said by this Court, in Railroad Company *vs.* Georgia, 98 U. S., 362, the effect of

a consolidation may be the absorption of one of the corporations by the other, whereby the former is dissolved, while the latter continues to exist; or the consolidation may be "a mere alliance between two pre-existing corporations, in which each preserves its identity and distinctive existence;" or, as I contend in this case, the original corporations may lose their identity and distinctive existence, without necessarily losing their property, rights or privileges, and they may be united and combined under a new name, with all the property, rights and privileges which they had previously enjoyed. As said by Mr. Justice Strong, in 98 U. S., 362, the answer to the question as to whether a particular corporate consolidation is to have one of those effects, or the other, "must be found in the intention of the Legislature, as expressed in the consolidating Act." I have already endeavored to show, in discussing the consolidating Act of April 19, 1866, that, looking to the scope and tenor of the whole Act, and to the charters referred to in it, as read by the light of surrounding circumstances, the intention of the Legislature was that the original exemptions from taxation should not be forfeited by the mere union of the original companies under a new corporate name; and that such intention was manifested "in clear and express terms" as required by the statement of the rule, as made by Mr. Justice Mathews in Memphis Railroad Company *vs.* Commissioners, 112 U. S., 617.

All of the cases above referred to by our opponents, and in which this Court held that the privileges or franchises of the original corporations were lost by their consolidation, were decided upon consolidations made in States, where a change of State policy had occurred after the original companies were incorporated, and before the consolidations were made; and where at the time of the consolidations, the Constitution, or some General Statute of the State, prohibited the granting of irrepealable charters, or of exemptions from taxation.

In considering the legal effect of a consolidation, made under the legislation of such a State, the Court would naturally start out with the presumption that the Legislature did not intend to violate the Constitution, or the General Statutes of the State;

and therefore that they did not intend that the consolidated company should have an irrepealable exemption from taxation. But in 1866, there was no statutory, or constitutional prohibition, against irrepealable exemptions from taxation ; the State of Tennessee had been granting them for thirty years, in almost every railroad charter, and there was no reason, or motive of public policy, to require the original companies in this case, to surrender their exemptions, as a condition precedent to their uniting under a new corporate name.

Another marked distinction between the cases cited by our opponents, and this case, consists in the fact, that in all of those cases, the franchises or privileges which were held by the Court to have been surrendered, belonged to the original corporations, in their corporate capacities, and as legal entities, distinct from their stockholders. In such a case, it might well be supposed, that the privileges and franchises which belonged alone to the corporation, should cease with its dissolution. But in this case, the exemption did not belong to the original corporations, as distinct legal entities, but to the stockholders as their private right ; and though the Legislature may have intended the technical dissolution of the original corporations, it is to be hoped that they did not intend the death of the individual stockholders!

The exemption from taxation was attached to the shares of the original companies, and followed said shares in their transfers from one holder to another, like the tax-receivability of the notes of the Bank of Tennessee, followed those notes, as held by this Court, in Furman *vs.* Nichol, 8 Wall., 63.

The exchange of the original shares, for shares of the consolidated company, was but a species of novation made with the consent of the State, and the exemption, which was attached as an element of value to the original shares, passed into the consolidated shares, as in the case of other novated securities.

XII.

The petition for mandamus in this case seeks to compel the defendant to assess for taxation all the shares of stock of the Nash-

ville and Decatur Railroad Company by whomsoever held or owned; and a very large amount of it is held and owned by citizens and residents of other States, who have the certificates therefor in their possession beyond the jurisdiction of this State; and the next question is, are the shares of non-resident stock holders subject to taxation, even if the capital stock is not exempt upon any of the grounds for which I have contended above?

In Union Bank *vs.* State, 9 Yerg., 500–1, the Supreme Court of Tennessee, use this language: "The power to tax non-resident stockholders is denied, and we think correctly; from its very nature it must be a tax *in personam* and not *in rem*. Stock is in the nature of a chose in action and can have no locality. It must therefore of necessity follow the person of the owner." * * * "Stock is not a thing in itself capable of being taxed on account of its locality, and any tax imposed upon it must be in the nature of a tax upon income, and of necessity confined to the person of the owner; and if he be a non-resident he is beyond the jurisdiction of the State and not subject to her laws."

It is supposed that this case is overruled by the case of the Mayor, etc., *vs.* Thomas, 5 Cold., 604, but, as the court decided in that case, that under the law of Tennessee, as it then stood, stock was taxable at the owner's residence, it was mere obiter for the Judge to say that it was competent for the Legislature to make it taxable at the chief office of the corporation. Besides, the defendant in that case was a resident of Tennessee, and there was nothing before the court to raise the question as to the liability of a non-resident to be taxed in Tennessee.

The case of McLaughlin *vs.* Chadwell, 7 Heisk, 407–8, arose under the National Banking Act of Congress, which expressly authorizes the shares of National Banks to be taxed where the banks are located; besides, all the parties before the court in that case were residents of Tennessee.

The case of Bedford *vs.* Mayor, etc., 7 Heisk., 409, raised the question as to whether the State of Tennessee, as between residents and citizens of its own State, could make the stock in corporations taxable at the place where the corporations are located,

and it was decided that the State could do so. As between its own citizens, the State of Tennessee may have the right to fix the taxable situs of corporate stocks at any place in the State that it may see proper to select, but there was nothing in that case to call for an expression of opinion as to whether the State of Tennessee would have that right as to stock owned by non-residents of the State.

The case of Tappan *vs.* Merchants' National Bank, 19 Wall., 499, decides that a State may tax non-resident stockholders of a National Bank at the place where the bank is located in the State, but the decision is placed upon the express ground that the National Banking Act of Congress fixes the taxable situs of such shares at the place where the National Bank is located, and authorizes the State to tax the shares of non-residents as well as the shares of residents. The court say (page 500) that every stockholder in a National Bank takes his shares subject to this power of taxation under State authority, and every non-resident by becoming an owner voluntarily submits himself to the jurisdiction of the State in which the bank is established, for all the purposes of taxation on account of his ownership.

There is nothing in the case to intimate that in the absence of congressional action, a State may tax the shares held by non-residents in corporations other than National Banks. On the contrary, the court (on page 499) state the general principle applicable to ordinary cases as follows: "The power of taxation by any State is limited to persons, property, or bnsiness within its jurisdiction. Personal property in the absence of any law to the contrary, follows the person of the owner, and has its situs at his domicil."

The court refer to and approve the case of the State *tax* on foreign held bonds. [15 Wall., 319.]

There was no provision in the charters of any of the original companies in this case, nor in the acts authorizing or confirming the consolidation of the Nashville and Decatur Railroad Company, authorizing the assessment of corporate stocks at the place where the corporations were located.

In the case of Railroad Company *vs.* Jackson, 7 Wall, 262, the Court decided that a State has no power to tax the interest of bonds (secured in that case by mortgage) given by a railroad corporation, and binding every part of the road, when the road lies partially in another State; one road having been incorporated by the two States.

In the case of St. Louis *vs.* Ferry Company, 11 Wall., 430, the Court use this language: "Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the Legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limit, and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative, as valid judicial action."

In the case of the State Tax on Foreign-held Bonds, 15 Wall., 300, the Court held that, bonds issued by a railroad company are property in the hands of the holders, and when held by non-residents of the State in which the company was incorporated, they are beyond the jurisdiction of that State. And the Court re-affirmed the doctrine that the power of taxation of a State is limited to persons, property and business within her jurisdiction, and that all State taxation must relate to one of those subjects. [See also Murray *vs.* Charleston, 96 U. S., page 448.]

It is true that this Court held in Railroad Company *vs.* Collector, 100 U. S., 595, that Congress could tax dividends and interest due from corporations in this country, to stockholders and bondholders who were citizens or subjects of foreign governments; but the Court expressly held that the tax was an excise tax on the business of the corporations mentioned in the statute, and that it was not a tax on the stockholders or bondholders.

The Court say: "The manifest purpose of the law was to levy a tax on the net earnings of the corporations."

The Act of Congress provided that, "Any railroad, canal, turnpike, canal-navigation or slack-water company indebted for

any money for which bonds or other evidences of indebtedness have been issued" * * * "or any such company that may have declared any dividends in script or money, due or payable to its stockholders, including non-residents, whether citizens or aliens" * * * "shall be subject to and pay a tax of 5 per cent. on the amount of all such interest or coupons, dividends or profits," etc.

The Assessment Act of Tennessee under which the defendant in this case would be compelled to make his assessment, does not impose any tax upon the corporation at all, but imposes the tax directly upon the stockholders. It is as follows: "That no tax shall hereafter be assessed upon the capital of any bank or banking association, or of any other joint stock company organized under the charter of this State, or of the United States, but the *stockholders* in such bank or banking association or other corporations *shall be assessed* a tax on the value of their shares of stock therein; said *shares* shall be included in the valuation of personal property *of such stockholder* in the assessment of State, county or municipal taxes at the place, town, ward or district where such bank or banking association or other corporation is located, and not elsewhere, whether said stockholder resides in said place, town, ward or district or not."

It will be seen that the assessment law of Tennessee bears no resemblance to the Act of Congress, the constitutionality of which was affirmed in the case of Railroad Company *vs.* Collector, 100 U. S., 595.

The case of U. S. *vs.* Erie Railroad, 106 U. S., 327, simply follows the case of Railroad *vs.* Collector, and needs no further comment.

ED. BAXTER.
Of Counsel for Defendant in Error.

APPENDIX.

CHAPTER I.

An Act to incorporate the Nashville & Chattanooga Railroad Company.
[Acts Tennessee, 1845–6, pages 17 to 27.]

SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That for the purpose of establishing a communication by railroad between Nashville and Chattanooga, the formation of a company is hereby authorized, which, when formed, shall be a body corporate by the name and style of "The Nashville & Chattanooga Railroad Company," and by said corporate name shall be capable in law to buy, receive by gift, hold, sell and convey, real and personal estate, as hereinafter provided, make contracts, sue and be sued, to make by-laws, and to do all lawful acts properly incident to a corporation, and necessary and proper to the transaction of the business for which it is incorporated, and to have and use a common seal, and the same to alter and destroy at its pleasure, and shall have perpetual succession of members.

SEC. 2. Books for subscription of sixty thousand shares of the capital stock of said company, of twenty five dollars each, shall be opened on the first Monday in January, 1846, and shall be kept open for six days, between the hours of ten o'clock in the morning and four o'clock in the evening of each of those days, at the following places, and by the following Commissioners, to-wit:

At Nashville by James Overton, John M. Hill, George W. Martin, Thomas Washington, John Shelby, Godfrey M. Fogg, John W. Walker, Jacob McGavock, J. Hugh Smith, W. W. Woodfolk, A. W. Vanleer, Samuel Watkins, Thomas Wells, John Thompson, Joseph B. Knowles, James Erwin, Felix R. Raines, Pleasant Smith, J. J. Gill, John Nichol, West H. Humphreys, R. J. Meigs, A. V. S. Lindsley, Alexander Allison and Robert I. Moore.

At Gallatin, by James A. Blackmore, Elijah Boddie, Henry B. Vaughn, Daniel S. Donelson, S. R. Anderson and William M. Blakemore.

At Shelbyville, by Robert Matthews, George Davidson, Thomas Dean, John Eakin and W. C. Swanson.

At Gainesboro, by Thomas L. Bransford, Watson M. Cooke, Samuel E. Hare and Richard P. Brooks.

At Lebanon, by Paulding Anderson, R. L Caruthers and Calvin Jackson.

At McMinnville, by George R. Smartt, William Black, Jesse Locke Phillip Hoodenpyl and L. D. Mercer.

At Franklin, by Thomas Parks, William Park, Nicholas Perkins, Samuel Crockett and Robert C. Foster.

At Murfreesboro, by Charles Ready, Edwin A. Keeble, Marman Spence, Lewis Garner and L. H. Carney.

At Sparta, by James Snodgrass, John Warren and William M. Young.

At Fayetteville, by John Clark, Jr., John M. Bright, Robert Farquharson, William T. Ross, James Fulton and William Bonner.

At Pulaski, by Andrew M. Ballentine, Thomas Martin and Benjamin Carter.

At Winchester, by Benjamin Decherd, Mark Hutchins, James Harris, James Sharp, Thomas Wilson and C. C. Garner.

At Chattanooga, by Robert M. Hooke, Benjamin Chandler and John P. Long.

At Jasper, by Jackson Pryor, Daniel R. Rawlings and John Herriford.

At Lewisburg, by Benjamin Williams, Ephraim Hunter, James V. Ewing, Morgan Fitzpatrick and Henry Hardin.

SEC. 3. The said Commissioners, or a majority of them, at each of the places aforesaid, shall receive subscription for stock in the said railroad company during the time the said books are directed to be kept open, and on each share so subscribed shall demand and receive the sum of fifty cents, without which the subscription shall be void.

SEC. 4. As soon as the time for receiving subscriptions as aforesaid shall have expired, the said Commissioners shall respectively deposit all the money so received by them in some incorporated bank redeeming its notes in specie, to the credit of the Nashville & Chattanooga Railroad Company, and subject to the order of the President of

the Board of Commissioners hereinafter appointed, and shall also forward a correct list of all the subscribers to the said stock, with the number of shares each subscriber has taken, to a Board of Commissioners, to be composed of the following persons: John M. Bass, John M. Hill, Francis B. Fogg, Andrew Ewing, A. O. P. Nicholson, V. K. Stevenson, John Bell, Willoughby Williams, William Nichol, S. D Morgan, Joseph T. Elliston, Joseph W. Horton, James A. Porter, James Overton and John Shelby—who may establish rules to govern their proceedings, choose their own President and appoint such other officers and agents as they may think proper, and prescribe their duties, and who, or a majority of whom, shall meet at Nashville on the third Monday in January next—ascertain the whole number of shares taken in the said company, and publish the same in some newspaper printed in Nashville on or before the fourth Monday in January next; and if the number of four thousand shares shall have been subscribed, on each of which there shall have been paid the sum of fifty cents, the Nashville & Chattanooga Railroad Company shall be regarded as formed, and thenceforth and from the day of the closing of the books of subscription, as aforesaid, the said subscribers to the stock shall form a body politic and corporate in deed and in law, by the name and for the purpose aforesaid, and in all things to be represented by the Board of Commissioners aforesaid until the election of a Board of Directors as hereinafter prescribed.

Sec. 5. If, on closing the books aforesaid, the number of four thousand shares shall not have been subscribed, then and in that case the said Board of Commissioners, by themselves or their agents, may receive subscriptions till the number of four thousand shares be taken, and whenever that number of shares shall be subscribed, the company shall be considered as formed, as having a corporate existence as aforesaid, and of which notice shall be given as hereinbefore directed, and may proceed to survey the route for the road, and make an estimate of the cost of its construction. Nevertheless, no conclusive and binding location of the road shall be made by the Board of Commissioners, but the same to be left to the determination of the first Board of Directors chosen by the stockholders. And the said Board of Commissioners may, by themselves or their agents, at such times and places as they may think proper, and upon such terms as to time and manner of payment as they may deem expedient, receive additional subscriptions until the number of forty thousand shares shall have been subscribed, upon which the company may be formed, and the subscribers shall thenceforth form a body corporate as afore-

said; Provided the same shall be done on or before the first day of January, 1848. And for the residue of the original number of sixty thousand shares the said corporation, when organized, may, in like manner, receive additional subscriptions.

SEC. 6. In case more than sixty thousand shares shall have been subscribed on closing the books when they are first opened, the shares shall be reduced to that number by deducting the surplus shares from the highest subscribers, placing them on equality of numbers as far as can be done; and after such reduction, the holders of the remaining shares shall form the company, and be interested therein in proportion to the number of shares which they may then respectively hold.

SEC. 7. If, on closing the books on the first day of January, eighteen hundred and forty-eight, the number of forty thousand shares shall not have been subscribed, the money paid by each subscriber shall be returned to him by the said Board of Commissioners, after defraying the expenses of opening the books, and of making a survey and map of the route and estimate of the cost of the road, which the said Commissioners are hereby authorized to have made as soon as practicable.

SEC. 8 The affairs of said company shall be managed by a Board of Directors, to consist of fifteen, who shall be chosen by the stockholders from their own body, and a president of the company shall be elected by the directors from among their own members, in such manner as the regulations of the corporation shall prescribe.

SEC. 9. As soon as the number of forty thousand shares shall have been subscribed, it shall be the duty of the Commissioners appointed to declare the same, to appoint a time for the stockholders to meet in Nashville, and give notice thereof by publication in some of the newspapers of Nashville, at which time and place the said stockholders, in person or by proxy, shall proceed to elect the directors of the company, and to enact all such regulations, rules and by-laws as may be necessary for the government of the corporation and the transaction of its business. The persons elected directors at this meeting shall serve for such period, not exceeding one year, as the stockholders may direct; and at this meeting the stockholders shall fix on the day and place or places where the subsequent elections of directors shall be held; and such elections shall thenceforth be annually made. But if the day of annual election should pass without any election of

directors, the corporation shall not be thereby dissolved, but it shall be lawful on any other day to hold and make such election in such manner as may be prescribed by a by-law of the corporation.

SEC. 10. The Board of Directors may fill up all vacancies which may occur in it during the period for which their Board shall have been elected; and in the absence of the president may fill his place by electing a president *pro tempore*.

SEC. 11. All contracts and agreements authenticated by the president of the Board shall be binding on the company without seal, or such other mode of authentication may be used as the company by their by-laws may adopt.

SEC. 12. The Board of Directors shall not exceed, in their contracts, the amount of the capital of the corporation, and of the funds which the company may have borrowed and placed at the disposal of the Board; and in case they should do so, the president and directors who may be present at the meeting at which such contract or contracts so exceeding the amount aforesaid, shall be made, shall be jointly and severally liable for the excesses, both to the contractor or contractors and the corporation: Provided, that any one may discharge himself from such liability by voting against such contract or contracts, and causing such vote to be recorded on the minutes of the Board, and giving notice thereof to the next general meeting of the stockholders.

SEC. 13. After the route of such railroad shall have been accurately surveyed and adopted, and a plat thereof deposited in the office of the Secretary of State, it shall not be lawful for any other railroad to be built, cut or constructed, in any way or manner, or by any authority whatsoever, running laterally within twenty miles of the route so adopted, unless by said company, or with the consent of the Board of Directors thereof for the time being.

SEC. 14. The said company shall have the exclusive right of transportation or conveyance of persons, goods, merchandise and produce over the said railroad by them to be constructed: Provided, that the charge of transportation or conveyance shall not exceed thirty-five cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement for every hundred miles, and five cents a mile for every passenger; And provided also, that the said company may, when they see fit, farm out their rights of transportation on said road, subject to the rates above mentioned.

SEC. 15. The Board of Directors may call for the payment of twenty-four and a half dollars on each share of stock in sums not exceeding two dollars in every thirty days: Provided, that twenty days' notice be given of such call in at least one public newspaper of the State in which any of the stockholders may reside; and a failure to pay, or secure to be paid, according to the rules of the company, any of the installments so-called, as aforesaid, shall induce a forfeiture of the share or shares on which default shall be so made, and all payments thereon, and the same shall vest in and belong to the company, and may be restored to the owner or owners by the Board of Directors, if they deem proper, on the payment of all arrears on such shares, and legal interest thereon; or the directors may waive the forfeiture after thirty days' default, and sue the stockholders for the installments due, at their discretion.

SEC. 16. The stock of said company may be transferred in such manner and form as may be directed by the by-laws of the said corporation.

SEC. 17. The said company may at any time increase its capital to a sum sufficient to complete the said road, and stock it with every thing necessary to give it full operation and effect, either by opening books for new stock, or by selling such new stock, or by borrowing money on the credit of the company, and on the mortgage of its charter and works; and the manner in which the same shall be done in either case shall be prescribed by the stockholders at a general meeting; and any State, or any citizen, corporation or company of this or any other State or country, may subscribe for and hold stock in said company, with all the rights and subject to all the liabilities of any other stockholder.

SEC. 18. The Board of Directors shall once in every year, at least, make a full report on the state of the company and its affairs to a general meeting of the stockholders, and oftener if directed by a by-law, and shall have power to call a general meeting of the stockholders when the Board may deem it expedient.

SEC. 19. No person but a citizen of the United States, and being a *bona fide* stockholder in his own right of, at least, forty shares, which he shall have held at least three months previous to his election (except at the first election) shall be president or a director of the company; nor shall any stockholder vote in person or by proxy at any general or other election (except the first) who shall not have

held in his own right the shares on which he offers to vote at least three months previous to such election.

SEC. 20. Stockholders may vote in person or by proxy, and in the election of directors, and in voting on all questions which come before a meeting of the stockholders, or which may be submitted to the decision of the stockholders in any other manner, the vote shall be taken according to the following scale: the owner of one or two shares shall be entitled to one vote; the owner of not less than three nor more than four shares shall be entitled to two votes; the owner of not less than five nor more than six shares shall be entitled to three votes; the owner of not less than seven nor more than eight shares to four votes; the owner of not less than nine nor more than eleven shares to five votes; the owner or not less than twelve nor more than fifteen shares to six votes; the owner of not less than sixteen nor more than twenty shares to seven votes; the owner of not less than twenty-one nor more than twenty-six shares to eight votes; the owner of not less than twenty-seven nor more than thirty-three shares to nine vote; the owner of not less than thirty-four nor more than forty shares to ten votes; and the owner of every ten shares above forty shall be entitled therefor to one vote: Provided, that no individual, corporation or company shall be entitled to more than five hundred votes.

SEC. 21. The said company may purchase, have and hold in fee, or for a term of years, any lands, tenements or hereditaments which may be necessary for said road or appurtenances thereof, or for the erection of depositories, storehouses, houses for the officers, servants, or agents of the company, or for workshops or foundries to be used for the said company, or for procuring timber, stones, or other materials necessary for the construction of the road or its appurtenances, or for effecting transportation thereon.

SEC. 22. The said company shall have the right, when necessary, to construct the said road, or any branch thereof, across or along any public road or water-course; Provided, that the said road and the navigation of such water-course shall not be thereby obstructed; And provided further, that such railroad shall not be located so near any turnpike road as to injure or prejudice the interests of the stockholders in such turnpike road, except upon such terms as may be agreed upon by the president and directors of the same, on behalf of the stockholders.

SEC. 23. The said company may purchase, have and hold any bridge or turnpike road over which it may be necessary to carry the said railroad; and when such purchase is made to hold the said bridge or turnpike road on the same terms, and with all rights which belong to the individual; individuals or corporation from which such purchase may be made; Provided, that the said company shall not obstruct any public road without constructing another as convenient as may be.

SEC. 24. Where any lands or right of way may be required by the said company for the purpose of constructing their road, and for want of agreement as to the value thereof, or from any other cause, the same cannot be purchased from the owner or owners, the same may be taken at a valuation to be made by five commissioners, or a majority of them, to be appointed by the circuit court of the county where some part of the land or right of way is situated, and the said commissioners, before they act, shall severally take an oath before some justice of the peace, faithfully and impartially to discharge the duty assigned them. In making the said valuation the commissioners shall take into consideration the loss or damage which may occur to the owner or owners in consequence of the land being taken or the right of way surrendered, and also the benefit and advantage he, she or they may receive from the erection or establishment of the railroad or works, and shall state particularly the nature and amount of each, and the excess of loss and damage over and above the benefit and advantage shall form the measure of valuation of the said land or right of way. The proceedings of the said commissioners, accompanied with a full description of the said land or right of way, shall be returned, under the hands and seals of a majority of the commissioners to the court from which the commission issued, there to remain of record. In case either party to the proceedings shall appeal from the valuation to the next session of the court granting the commission, and give reasonable notice to the opposite party of such appeal, the court shall order a new valuation to be made by a jury, who shall be charged therewith in the same term, or as soon as practicable, and their verdict shall be final and conclusive between the parties, unless a new trial shall be granted; and the lands or right of way, so valued by the commissioners or jury, shall vest in the said company in fee simple, so soon as the valuation may be paid, or when refused, may be tendered. Where there may be an appeal, as aforesaid, from the valuation of commissioners by either of the parties, the same shall not prevent the works intending to be constructed from proceeding;

but where the appeal is by the company requiring the surrender, they shall be at liberty to proceed in their works only on condition of giving to the opposite party a bond, with good security, to be approved of by the clerk of the court where the valuation is returned, in a penalty equal to double the said valuation, conditioned for the payment of said valuation and interest, in case the same be sustained; and in case it be reversed, for the payment of the valuation thereafter to be made by the jury and confirmed by the court; Provided, that when the land cannot be had by gift or purchase, the operations of the work are not to be hindered or delayed during the pendency of any proceeding to assess its value as aforesaid; nor shall any injunction or supersedeas be awarded by any judge or court to delay the progress of said work.

SEC. 25. In the absence of any contract with the said company in relation to lands through which the said road may pass, signed by the owner thereof, or by his agent, or any claimant or person in possession thereof, which may be confirmed by the owner, it shall be presumed that the land upon which the said road may be constructed, together with a space of one hundred feet on each side of the center of said road has been granted to the company by the owner thereof, and the said company shall have good right and title thereto, and shall have, hold and enjoy the same as long as the same be used only for the purposes of the road, and no longer, unless the person or persons owning the said land at the time that part of the road which may be on said land was finished, or those claiming under him, her or them shall apply for an assessment for the value of the said lands, as hereinbefore directed, within five years next after that part of said road was finished. And in case the said owner or owners, or those claiming under him, her or them shall not apply for such assessment within five years next after the said part was finished, he, she or they shall be forever barred from recovering the said land, or having any assessment or compensation therefor: Provided, nothing herein shall affect the right of *femmes covert* or infants until two years after the removal of their respective disabilities.

SEC. 26. If any person shall intrude upon the said railroad, or any part thereof, by any manner of use thereof, or of the rights and privileges connected therewith, without the permission, or contrary to the will of said company, he, she or they shall forthwith forfeit to the said company all the vehicles that may be so intruded on said road, and the same may be recovered by suit at law; and the person

or persons so intruding may also be indicted for misdemeanor and upon conviction, fined and imprisoned by any court of competent jurisdiction.

SEC. 27. If any person shall willfully and maliciously destroy, or in any manner hurt, damage or obstruct the said railroad, or any bridge, or any vehicle used for, or in the transportation thereon, such person or persons so offending shall be liable to be indicted therefor, and on conviction shall be imprisoned not more than six nor less than one month, and pay a fine not less than twenty dollars; and shall be further liable to pay all the expenses of repairing the same; and it shall not be competent for any person so offending against the provisions of this clause to defend himself by pleading or giving in evidence that he was the owner, or agent, or servant of the owner of the land where such destruction, hurt, damage, injury or obstruction was done or caused, at the time the same was caused or done.

SEC. 28. Every obstruction to the safe and free passage of vehicles on the said road, shall be deemed a public nuisance, and may be abated as such by an officer, agent or servant of the company, and the person causing such obstruction may be indicted and punished for erecting a public nuisance.

SEC. 29. The said company shall have the right to take, at the storehouses they may establish or annex to their railroad, all goods, wares, merchandise and produce intended for transportation, prescribe the rules of priority, and charge and receive such just and reasonable compensation for storage as they, by rules, may establish (which they shall cause to be published), or as may be fixed by agreement with the owner, which may be distinct from the rates of transportation: Provided, that the said company shall not charge or receive storage on goods, wares, merchandise or produce which may be delivered to them at their regular depositories for immediate transportation, and which the company may have the power of transporting immediately.

SEC. 30. The profits of the company, or so much thereof as the Board of Directors may deem advisable, shall, when the affairs of the company will permit, be semi-annually divided among the stockholders in proportion to the stock each may hold.

SEC. 31. The said company is hereby expressly prohibited from carrying on any banking operations, but may effect insurance on lives and property transported on the road.

SEC. 32. Whenever, in the constructien of said road, it shall be necessary to cross or intersect any established road or way, it shall be the duty of the company to construct said road across such established road or way so as not to impede the passage or transportation of persons or property along the same; or where it shall be necessary to pass the land of any individual, it shall be their duty to provide for such individual a proper wagon-way or ways across said road from one part of his land to the other.

SEC. 33. The said company shall possess such additional powers as may be convenient for the due and successful execution of the powers granted in this charter, and for the successful construction and management of the work.

SEC. 34. This charter shall be amendable from time to time by the Legislature whenever the president and directors shall unanimously petition for amendments, specifying in the petition the nature of such amendments; and when such amendments shall be adopted by the Legislature and submitted to the directory, and be accepted and adopted unanimously by the president and directors, they shall be obligatory on the stockholders, and not otherwise.

SEC. 35. The president, directors, clerks, agents, officers and servants of said company shall be exempt from military duty, except in cases of invasion or insurrection, and shall also be exempt from serving on juries and working on public roads.

SEC. 36. The company shall have full power and authority to purchase and own such number of slaves as may be necessary for the construction of the said road, and for keeping the same in repair.

SEC. 37. If by decree or otherwise the said corporation shall be dissolved, the president and directors of said company are created trustees, with such powers only as may be necessary to collect the debts due the company, preserve the property, pay the debts, and distribute the property and effects of the company to those who may be entitled thereto under the charter.

SEC. 38. The capital stock of said company shall be forever exempt from taxation, and the road with all its fixtures and appurtenances, including workshops, warehouses and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer.

SEC. 39. The railroad authorized by this Act shall be commenced within three years after the passage of this Act, and shall be finished within six years thereafter, otherwise the charter hereby granted shall be void.

SEC. 40. Any individual or individuals, company or body corporate, with permission of the Legislature of this State may hereafter construct branches to unite with the said Nashville & Chattanooga Railroad; and it shall be the duty of said company, when required, to receive on their road the full loaded freight-cars from such branches, and transport the same to their destination, and to return them, without changing the loads thereof, or charging for the transportation of the goods, wares, merchandise and produce therein, any greater rate of freight than they charge for similar goods, wares, merchandise and produce in their own cars: Provided, that the company shall not be compelled to receive such cars on their road, unless they are constructed in the same manner, and are of equal strength with their own cars, of which the engineer of the main road shall be the judge: And provided, that the company shall not be required to receive any car from such branches without receiving payment for at least twenty miles transportation: And provided also, that the said company shall be entitled in all respects to similar and equal privileges on any branches constructed to unite with their road, subject to the same restraints.

BROOKINS CAMPBELL,
Speaker of the House of Representatives.
H. M. WATTERSON,
Speaker of the Senate.

Passed December 11, 1845.

CHAPTER LXXV.

An Act to charter the Tennessee and Alabama Railroad Company, and for other purposes.

[Acts Tennnessee, 1851-2, page 93.]

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That a body politic and corporate is hereby consti-

tuted, by the name and style of the Tennessee & Alabama Railroad Company, for the purpose of constructing a railroad from Nashville by the way of Franklin, to the line between the State of Tennessee and Alabama, in the direction of Florence in the State of Alabama, and said company shall have all the rights, powers and privileges, and be subject to all the liabilities and restrictions conferred and imposed upon the charter of the Nashville & Chattanooga Railroad Company, and all the various amendments, etc., thereto.

SEC. 2. *Be it enacted*, That the capital of said company shall be subject to be increased or decreased in the discretion of said company, to be divided into shares of fifty dollars each, and whenever five thousand shares of the capital stock is subscribed for, the company may organize as provided in the charter of the Nashville & Southern Railroad Company.

SEC. 3. *Be it enacted*, That D. Campbell, Elijah Thompson, F. Hardeman, Thomas Parkes, R. H. Allen, B. M. Moore, Wm. Callahan, Wm. Seimonton, Daniel Bently, Thomas Martin, R. M. Bugg, A. J. Polk, G. J. Pillow, B. Martin and J. J. Gibson, are hereby constituted a Board of Commissioners, a majority of whom may act, to manage all the affairs of the company until it shall be organized as aforesaid, and to procure subscriptions for stock, and provide for experimental surveys, as provided in the Nashville & Southern charter, etc.

JORDAN STOKES,
Speaker of the House of Representatives.
M. R. HILL,
Speaker of the Senate.

Passed, January 23, 1852.

CHAPTER I.

An Act to incorporate the Mississippi Central and Tennessee Railroad Company.

[Acts Tenn., 1853–4, pages 1 and 23.]

SEC. 15. *Be it further enacted*, That a body corporate and politic is hereby incorporated and constituted by the name and style of the Central Southern Railroad Company, for the purpose of constructing a railroad from a point of intersection with the Tennessee & Alabama Railroad, at Columbia, in Maury county, by way of Pulaski, in Giles county, to the Alabama line, in the direction of Athens and Decatur, Alabama, to connect with any railroad that may be constructed from Decatur, Alabama, to said State line, in the direction of Pulaski; and the said company shall have all the powers and privileges, and be subject to all the restrictions and liabilities prescribed in the charter of the Nashville & Chattanooga Railroad, and in the various amendments thereunto, except as hereafter prescribed. *Provided*, nothing contained in this Section shall be so construed as to require the aid of the State to said road.

SEC. 16. *Be it enacted*, That the capital stock of said company shall be one million of dollars, to be divided into shares of fifty dollars each, and the company shall have power to increase the capital stock to any amount sufficient to insure the completion of said road; and whenever one thousand shares of the capital stock shall have been subscribed for, said company may organize by the election of a Board of Directors, who shall elect a President from their number. When a vote is to be taken, each stockholder shall be entitled to one vote for each share of stock held by him.

SEC. 17. *Be it enacted*, That Roger B. Mayes, S. D. Frierson, James H. Thomas, W. C. Whitthorne, R. A. L. Wilkes, George Gantt, Thomas Martin, Giles A. Reynolds, Thomas E. Abernathy, Dr. B. Carter, Tyree Rodes, Thomas R. Gordon, David Maxwell, be, and they are hereby constituted a Board of Commissioners, a majority of whom may act, to manage all the affairs of said company, until it shall be organized by the election of a Board of Directors, as aforesaid, to procure the sub-

cription of stock, by the appointment of an agent or agents for that purpose, or in such manner as they may deem best; to provide for experimental surveys of routes for said railroad, and for the payment for making said surveys, and for procuring said subscriptions, out of such call on stock subscribed for, as they may deem advisable, and out of the funds hereafter provided for; but they shall not be compelled to require any part of the stock subscribed for to be paid in cash at the time it is subscribed for, and at all meetings of said Commissioners they may vote in person or by proxy, in relation to the affairs of the company before its organization as aforesaid, and they shall require each subscriber to execute his note to the company for one dollar for each share of stock subscribed for by him, and it shall be lawful for the same to be sued for and recovered of such subscribers, in the name of the company, whether organized as aforesaid or not, to be used when paid in defraying the expenses incurred by the Commissioners in the manner aforesaid.

SEC. 18. *Be it enacted*, That if said company should run the said railroad continuously on the line of any turnpike road, the company shall have power to do so, upon such terms as the company may agree upon with said turnpike company, by permitting such turnpike company to subscribe for such amount of stock in said railroad company as the parties may agree upon in lieu of the value of, or damages to said turnpike road, or otherwise, but said railroad company shall not be liable to pay to any turnpike company any damages for running laterally with, parallel or adjacent to any turnpike road, unless the road should be run continuously upon the bed of such turnpike road.

SEC. 19. *Be it enacted*, That it shall not be lawful for said company to make any unequal discriminations in their charge for freight or passage, or in the transportation of freight or passengers, in favor of any roads that may connect therewith.

SEC, 20. *Be it further enacted*, That the Thirteenth Section of an Act, passed December 11, 1845, incorporating the Nashville & Chattanooga Railroad Company, shall not be a part of this Act.

SEC. 21. *Be it further enacted*, That should any of the stockholders desire to pay their stock or any portion thereof, in work or labor, required in the construction of said road, they shall have the right to do so; *provided*, they will do such work (to be specified) upon contract with the President and Directors of said road, on as good terms, or for as low a price, as the Directors are able to get it done by others; and said stockholders desiring to pay their subscription in work, shall have preference over all others desiring the same contract; and should any two or more stockholders desire or bid for the same work, and neither will underbid the other, the one making the first application shall have preference; *provided*, in all cases where it is required, satisfactory security shall be given to the President and Directors for the completion of the work upon the terms specified in the contract.

WM. H. WISNER,
Speaker of the House of Representatives.
EDWIN POLK,
Speaker of the Senate.

Passed November 30, 1853.

An Act to Incorporate the Tennessee and Alabama Central Railroad Company.

[Acts of Alabama, 1853–4, page 298.]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened*, That James W. Sloss, Thomas A. Nelson, Boswell Hine, John R. Mason, James F. Sorrel, John R. Harris, W. W. Philips, Robert B. Peebles, M. C. Smith, Wm. D. Hays, A. Sidney Harris, J. N. S. Jones, Thomas Redus, Jonathan McDonald, John T. Tanner, B. W. Townsend, William Mailor, John D. Rather, A. A. Burleson, R. N. Walden, Henry Fennel, R. C. Mason, James Hendricks and George D. Shortridge, their associates and suc

cessors, with such other persons as shall associate with them for that purpose, are hereby appointed, constituted and declared a body politic and corporate, by the name of the Tennessee and Alabama Central Railroad Company, and by that name shall be capable, in law, of purchasing, holding or leasing, selling and conveying real, personal and mixed property, so far as shall be necessary for the purposes of this incorporation; and by said incorporated name, may sue and be sued, plead and be impleaded, answer and be answered unto, in any court of law or equity of this State or elsewhere, and to have and use a common seal, and the same to break, alter or amend at pleasure; to pass such rules and ordinances for the good government of said corporation as to them may seem proper, and generally to do all things necessary to carry into effect fully and completely the object of this act.

SEC. 2. *Be it further enacted*, That any five of said corporators may act and do all things necessary to be done preparatory to a meeting of the stockholders in the Tennessee and Alabama Central Railroad Company, and they shall open books of subscription for the capital stock of said company at such time and place, and with such notice, not less than thirty days, as they may think proper.

SEC. 3. *Be it further enacted*, That as soon as one hundred thousand dollars shall have been raised, either by subscription, loan or otherwise, to or by said company, said railroad company shall have authority hereby to put under contract for construction any or all portions of said road that they may think proper.

SEC. 4. *Be it further enacted*, That the capital stock of said railroad company may be one and a half million of dollars, in shares of twenty-five dollars each, with the privilege of increasing said stock to three million of dollars, should said increase be found necessary for its construction and future management.

SEC. 5. *Be it further enacted*, That the said railroad shall extend from the town of Montevallo, in Shelby county, in a northeasterly direction, through Decatur, in Morgan county, and across the Tennessee river at that point, thence through Athens, in Limestone county, and from thence to some point on the boun-

dary line between the States of Alabama and Tennessee, thence to connect with a railroad leading through Pulaski to Columbia, Tennessee; and that said company shall have the privilege of crossing the Tennessee river, either by junction, under contract, with the Memphis and Charleston Railroad Company, for which authority is hereby given, or by the construction of a separate bridge for that purpose, or by any other means that may be necessary to effect a crossing of said river.

SEC. 6. *Be it further enacted*, That as soon as one hundred thousand dollars shall have been raised, the corporators hereby appointed, shall call a meeting of the stockholders at such time and place as they may appoint; at such meeting said stockholders, or a majority of them in value, shall elect nine directors, by ballot, to manage the affairs of said company, and the corporators aforesaid, or any three or more of them, shall be judges of said first election; the directors then chosen shall elect among themselves a President of said company, and allow him such compensation as they may think proper; and on all occasions whenever a vote of stockholders shall be necessary to be taken, each stockholder shall be allowed one vote for every share owned by him or her, and any stockholder may depute any other person to vote or act for him or her as his or her proxy.

SEC. 7. *Be it further enacted*, That the President and Directors of said company shall be chosen annually by the stockholders of said company, and if any vacancy shall occur by death, resignation or otherwise, of any President or Director, or Directors, before the year for which they have been elected shall have expired, such vacancy shall be filled by the President and Directors, or a majority of them; and that the President and Directors shall hold their offices until their successors are chosen and qualified; shall have power to call meetings of stockholders at any time, and a majority of them shall have power to remove the President or any Director, and to fill all vacancies occasioned by removal, at pleasure.

SEC. 8. *Be it further enacted*, That the said President and Directors, or a majority of them, may appoint all such officers, engineers, agents or servants, whatsoever, as they may deem

necessary to carry on the business of said company, and dismiss them at pleasure; and a majority of them shall determine the compensation of all officers, engineers and servants of said company; shall have power to adopt all rules or regulations deemed necessary and proper for exercising all the powers vested in this company for carrying into effect the object of this act; and said President and Directors, or a majority of them, are empowered to borrow money to carry into effect the object of this act, to issue certificates or other evidences of such loan, and to pledge the property of said company for the payment of the same, with interest.

SEC. 9. *Be it further enacted*, That the said President and Directors shall have power to require the stockholders of said company, to pay such installments on their respective shares of stock in said company, and at such times as they may think best for the interest of said company: *Provided, however*, That thirty days' notice be given, and no call be made for more than eight per cent. upon each share; and upon the failure or refusal of any stockholder to pay the installment on his or their stock, in pursuance of any call made by said President and Directors may, upon giving thirty days' notice, proceed to sell, at public sale, the share or shares of said stock owned by such stockholder, or such part as they may think proper, to the highest bidder; and if upon the sale of said shares of stock owned by said defaulting stockholder said share should be sold for less than the amount due upon the installment above mentioned, said stockholder shall be liable to pay the said company the deficiency in manner and form hereinafter specified.

SEC. 10. *Be it further enacted*, That upon the failure or refusal of any stockholder to pay any installment called for or demanded by the President and Directors of said company, or if upon the sale of said shares as before specified, they shall be sold for less than the amount due on installment as above mentioned, the President and Directors, upon giving thirty days' notice to said defaulting stockholder, may proceed by their attorney to move the Circuit Court of the County in which said stockholder may reside, for judgment against such stockholder for the amount

called for by the President and Directors of said company, or as the case may be, for any deficiency that may occur in the sale of said stock as above specified; and said Court is hereby authorized and empowered and required to render judgment against said defaulting stockholder at the term of the Court at which said motion is made, which judgment so given shall be a lien on the real and personal property of said stockholder, and execution may issue as upon other judgments and costs; and all notices are hereby required to be given to any defaulting stockholder shall be issued by and in the name of the Secretary of the Board of Directors, and served by the Sheriff of the County in which the stockholder may reside, and shall be returned to the office of the Clerk of the Courts as in cases of common writs, with the same penalties; and the Sheriff shall be entitled to one dollar for serving said notice, which, with all the costs that may accrue on said proceedings, shall be paid by the party against whom judgment may be rendered.

SEC. 11. *Be it further enacted*, That the President and Directors of said company are hereby authorized to contract for and receive conveyances of land for the track of said road, not to exceed one hundred and fifty feet wide; also, for depots, stations, side tracks, turnouts, single and double, or treble tracks, etc., and of stone, timber, wood, gravel and earth, which may be necessary or required in the construction of said road; and when the owner and company cannot agree upon the price, or when the owner is an infant, non-resident, or *non compos mentis*, then it shall be lawful for the President and Directors of said company to apply to the Sheriff of said County in which said lands or other property may be situated; who shall summons a jury of seven disinterested freeholders, a majority of whom shall be authorized to assess the damages and return their award or judgment to the next term of the Circuit Court for the County in which said land or other property may be situated, which shall be entered by the Clerk as the judgment of the Court, and execution may issue thereupon for the amount of said judgment and cost: *Provided, always*, That if either party shall, upon the return thereof, be dissatisfied, they may, upon filing bond with good and sufficient security in such sum as the Court may order, be

allowed an appeal to the next term of the Circuit Court, where said cause shall stand for trial *de novo*: *Provided, also*, That thirty days' notice shall be given to the opposite party, served by the Sheriff of the county.

SEC. 12 *Be it further enacted*, That the jurors trying said case shall take the following oath, which the Sheriff is authorized to administer: "You, and each of you, do swear (or affirm, as the case may be), that you will well and truly try the case now pending and submitted to your decision, between A. B., complainant, and the President and Directors of the Tennessee & Alabama Central Railroad Company, defendants, and that you will render such compensation to the complainants as to you shall seem just and proper in the premises."

SEC. 13. *Be it further enacted*, That the said lands or other property, when so condemned or estimated as aforesaid, shall enure to and become the property of said company forever, upon the payment by the said company of the amount assessed by said jury to the party claiming damages on account of the construction of said road through said lands, or for such other property: *Provided*, That the work on the said road shall in no wise be delayed on account of the proceeding had as aforesaid.

SEC. 14. *Be it further enacted*, That in case any person or persons shall willfully injure or obstruct in any degree the said road, or injure any of the property connected with its construction or use, he or they shall forfeit and pay to the President and Directors of said company three times the amount of all damages they may sustain in consequence thereof, to be sued for and recovered in the same manner as provided by law for individuals in like cases; and on complaint to any Magistrate within whose jurisdiction such offense shall be committed, it shall be the duty of such Magistrate to bind the said person or persons so offending, with sufficient security, for his or their good behavior for a period not less than one year, and such offender shall also be subject to indictment, and shall be sentenced at the discretion of the court to be imprisoned not less than three nor more than six months.

SEC. 15 *Be it further enacted*, That in the construction of said railroad the President and Directors of said company shall not in any way or manner obstruct any public road, now established, but shall provide convenient passages to travel over said road.

SEC. 16. *Be it further enacted*, That the President and Directors of said company may cause any road or way to be changed or altered in such manner that said road may be made on the best site of ground for that purpose: *Provided*, That said company shall put such road or way in as good condition as at the time of altering or changing the same.

SEC. 17. *Be it further enacted*, That the President and Directors of said company, for the purpose of making said railroad or repairing or changing it afterwards, shall have the same right of entry of adjacent lands, and to cut, quarry, dig, take and carry away any stone, wood, gravel or other material which may be necessary as is before provided as to the right of way: *Provided, however*, In all cases said company shall make compensation to the owners as is agreed on in the manner hereinbefore provided for.

SEC. 18. *Be it further enacted*, That whenever in the construction of said railroad it may be necessary to cross any established railroad or way, authority is hereby given to cross the same; but it shall be the duty of said company so to construct their railroad as not to impede the passage of such established road or way, and if it be erected for said railroad over any navigable water course, the same shall be made so as not to obstruct the navigation of such water course.

SEC. 19. *Be it further enacted*, That payment of the subscription to the stock in said company may be made in the materials, labor, provisions and all and everything necessary for the construction of said road which the Board of Directors at their discretion may deem expedient to accept.

SEC. 20. *Be it furthex enacted*, That after the completion of said road, or any part thereof, the said President and Directors may levy and collect tolls from all persons, property, merchan-

dise and other comodity transported thereon: *Provided*, The net profits of said road shall never exceed twenty-five per cent. per annum.

SEC. 21. *Be it further enacted*, That said company shall have the right under the same rules, regulations and restrictions, and with the like privileges and immunities as herein granted to the main road, to extend, for the purpose of uniting with other roads, as well as to build and construct branch railroads, not more than five miles in length, on either side of said main road in any of the counties near the main road, and shall have authority to form junctions with other roads, and to erect and maintain toll houses and other buildings for the accommodation of their business as they may deem suitable for their interests.

SEC. 22. *Be it further enacted*, That the said railroad company shall have the power to unite and consolidate into one road all or such part of the said road with any railroad that may connect with the said Tennessee & Alabama Central Railroad at the Tennessee line, at the point at which the said Tennessee & Alabama Railroad may touch said Tennessee line: *Provided, however*, Said union or consolidation shall not be made or effected until a majority of the stockholders in value in said Tennessee & Alabama Central Railroad shall consent to the same.

SEC. 23. *Be it further enacted*, That in the event the said railroad company fail to obtain capital or means, by subscription or otherwise, to the extent mentioned in this charter under section three, within the period of twelve months, then and in that event it shall be lawful, and authority is hereby given and declared by the passage of this act, for the stockholders of said railroad company to exercise all the rights and privileges under the charter so as to construct and complete that portion of said line of road extending from the town of Decatur, in the county of Morgan, on the Tennessee river, through the town of Athens, in Limestone county, to the boundary line between the States of Tennessee and Alabama, so as to meet and connect with a railroad now contemplated in the State of Tennessee, to run through the town of Pulaski, in Giles county, to the town of Columbia, when the sum of one hundred and fifty thousand dollars shall

have been raised by subscription or otherwise: *Provided, however,* That the stock or means raised by subscription or otherwise in the counties of Morgan and Limestone, shall be first applied to the construction and completion of that part of the line of said railroad extending from the town of Decatur, on the Tennessee river, through the town of Athens, in Limestone county, to the State line at the point to intersect the contemplated railroad in the State of Tennessee: *And provided further,* That should said railroad company determine, under this provision, to construct and complete only that portion of said line of railroad, extending from Decatur through Athens to the Tennessee line, then and in that event said railroad company may, under this charter and in the manner mentioned in section six, by a meeting of the stockholders, reduce the number of Directors from nine to five; and authority is hereby given to increase or lessen the number of Directors from time to time, as the stockholders may deem necessary and proper for the good management of said portion of said line of railroad.

SEC. 24. *Be it further enacted,* That the said company hereby incorporated shall commence building said road and shall let out to contract for grading and cross-ties for at least twenty miles thereof within two years from the passage of this act.

SEC. 25. *And be it further enacted,* That nothing in this act contained shall be so construed as to prevent other railroad companies now or hereafter to be incorporated from crossing said Tennessee & Alabama Central Railroad, and other railroads now or hereafter to be incorporated shall have the right to connect or intersect with the Tennessee & Alabama Central Railroad Company upon the terms and conditions usual in the comity of railroad companies; and said company shall have no right to discriminate against roads so crossing or connecting.

APPROVED December 19, 1853.

CHAPTER LXX.

An Act Incorporating the New Orleans and Ohio Railroad Company.

[Acts Tennessee, 1865–6, pp. 217, 220.]

SEC. 5. *Be it further enacted*, That for the purpose of uniting and consolidating the Tennessee and Alabama Railroad Company and the Central Southern Railroad Company into one, the Directors of said companies be, and they are hereby authorized to agree upon the terms thereof, and to adopt all necessary and proper measures, agreements and obligations to effect the same; *provided*, said terms of consolidation, when perfected by the Directors of said companies, shall be submitted to a vote of the stockholders of said companies, and if assented to by a majority of the stockholders, the same shall be binding upon said companies, and that thereafter, and upon official report thereof to the President of the respective companies, and the Comptroller of the State, said consolidated and united companies shall be known and styled the "Nashville and Decatur Railroad Company," by which name it shall sue and be sued, and be entitled to all the rights and privileges, and be subject to all the liabilities and restrictions of a body corporate.

SEC. 6. *Be it further enacted*, That the said Nashville and Decatur Railroad shall, for its government, be entitled to all the rights and privileges, and subject to all the restrictions and liabilities conferred and imposed upon the Nashville and Chattanooga Railroad Company; *Provided*, that no State aid is intended to be extended to said Nashville and Decatur Railroad; *And provided further*, that no new liability to the State of Tennessee is intended to be imposed hereby upon said Tennessee and Alabama Railroad Company and the Central Southern Railroad Company.

SEC. 7. *Be it further enacted*, That the Directors of said Tennessee and Alabama Railroad Company, in maturing the terms of consolidation hereinbefore provided, may adopt such by-laws, rules and regulations, not inconsistent with the laws of Tennessee, and the United States, as may be necessary and proper to the successful operation and management of said consolidated com-

pany, and may provide in said terms for the discharge of their respective indebtedness, so as to bind said consolidated company therefor; *Provided*, that nothing in this Act shall be construed to alter or affect the lien of the State of Tennessee for aid heretofore extended to said companies, but the same shall be extended and held as a liability against said consolidated company.

SEC. 8. *Be it further enacted*, That an election shall be held by the stockholders of the Tennessee and Alabama Railroad, and the Central Southern Railroad, jointly, on the first Monday in May next, at the town of Pulaski, in Giles county, for Directors for said roads thus combined, who shall be elected in the same manner as is now provided for the Tennessee and Alabama Railroad in its charter, and shall hold their office for one year, and until their successors are elected and qualified.

SEC. 9. *Be it further enacted*, That the Tennessee and Alabama Railroad and the Central Southern Railroad, thus consolidated, may, through their Directors thus elected, be consolidated with the Alabama and Tennessee Central Railroad, upon such terms as may be agreed upon between them, and approved by the stockholders of said roads, to be hereafter known as the Nashville and Decatur Railroad; such terms not to be in conflict in anywise with those herein contained, but may be supplementary or in addition thereto; *Provided*, the consolidation herein provided for be approved by Act of the Legislature of the State of Alabama, heretofore or hereafter passed, and said railroad, thus consolidated, may, by their stockholders, regularly convened, upon thirty days' notice in the newspapers of Nashville and Huntsville, elect Directors to serve them for the term of twelve months, and until their successors shall be elected.

SEC. 10. *Be it further enacted*, That the capital stock of said united companies shall be the aggregate amount of their respective charters, with the addition thereto of ——— dollars; and that this Act shall take effect from and after its passage.

WILLIAM HEISKELL,
Speaker of the House of Representatives.
JOSHUA B. FRIERSON,
Speaker of the Senate.

Passed April 19, 1866.

An Act to change the name of the Tennessee and Alabama Central Railroad Company.

[Acts Alabama, 1866-7, p. 763.]

WHEREAS, The Tennessee and Alabama Central Railroad Company, under authority given by the act of incorporation of said company, approved the 14th December, 1853, did consolidate with the Central Southern and Tennessee and Alabama Railroad into one company to be known and styled, "The Nashville and Decatur Railroad Company"; therefore—

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened,* That the consolidation aforesaid is hereby confirmed and declared valid.

SEC. 2. *Be it further enacted,* That the name of the Tennessee and Alabama Central Railroad Company be changed, and that hereafter said road be known by the corporate name and style of the Nashville and Decatur Railroad Company.

APPROVED February 19, 1867.

CHAPTER LV.

An Act for the Benefit of the Nashville and Decatur Railroad Company, and for other purposes.

[Acts Tennessee, 1866-7, pp. 157-8.]

WHEREAS, By An Act of the General Assembly of the State of Tennessee, passed April 19, 1866, authorizing the Tennessee and Alabama Railroad Company, the Central Southern Railroad Company, and the Tennessee and Alabama Central Railroad, to consolidate their companies into one company, to be known and styled the Nashville and Decatur Railroad Company; *and whereas,* the stockholders met at Columbia, Tennessee, on Wednesday, the 21st day of November, 1866, agreed to and confirmed the terms

of consolidation; *and whereas*, at the said Stockholders' Convention, there were fifteen Directors elected, to serve for the ensuing twelve months; therefore,

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the consolidation aforesaid, be, and the same is hereby as fully confirmed in all respects, as if the Convention had been held on the first Monday of May, 1866; and that the said consolidation, and all Acts of said Convention, be, and the same are hereby declared valid.

SEC. 2. *Be it further enacted*, That under the said consolidation, the shares of stock in said company shall represent twenty-five dollars each.

SEC. 3. *Be it further enacted*, That the Board of Directors of said company, be, and the same are hereby authorized to aid in the construction of the road south of Decatur, in the direction of Line Station, either by taking stock in the same, endorsing the bonds of any company, undertaking its construction, or by any other means in their power; and for that purpose, they are hereby authorized to issue the bonds of the company to an amount not to exceed one million dollars, upon such terms and conditions as a majority of the Board of Directors may elect; *Provided*, the interest on said bonds shall not exceed ten per cent. per annum.

SEC. 4. *Be it further enacted*, That a majority of the said Board of Directors be, and the same are hereby authorized to issue, not exceeding five hundred thousand dollars of preferred stock in said consolidated company, or to issue Income Bonds of said company, to an amount not exceeding five hundred thousand dollars, at a rate of interest not to exceed two per cent. per annum, as they may elect; *Provided*, that nothing in this Act shall be so construed as to invalidate the lien or priority of the State against said railroads hereby consolidated.

SEC. 5. *Be it further enacted*, That the Louisville and Nashville Railroad Company are entitled to all the privileges of Sec. 3

of this Act. And that this Act shall take effect from and after its passage.

J. S. MULLOY,
Speaker pro. tem. of the House of Representatives.
JOSHUA B. FRIERSON,
Speaker of the Senate.

Passed March 8, 1867.

CHAPTER LXXVIII.

An Act declaring the mode and manner of valuing the PROPERTY of a Railroad Company for taxation.

[Acts Tennessee, 1875, pp. 100 to 107.]

WHEREAS, It is provided in Section 28 of Article 2 of the Constitution of this State, that "All property shall be taxed," and further, that "All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State"; and,

WHEREAS, The four elements of property in all joint stock companies are: 1st, the capital stock; 2d, the corporate property; 3d, the franchises of the corporataion; and, 4th, the individual stock of the shareholders; therefore,

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That each railroad company owning and operating a railroad in the State shall, on or before the first day of May of each year, make out and file with the Comptroller of the Treasury a complete schedule of all its property, real, personal, or mixed, setting forth therein the length in miles or fraction thereof of its entire road-bed, switches and side tracks, and showing how many miles or fractions thereof lie in the State, in each county of the State through which the road passes, and in each incorporated town, and the value of the whole and each part thereof, as sub-divided herein; the total amount of capital stock; the number of engines and their respective values; the gross

annual receipts; the number of cars of all character, their classes and value; the number of depot buildings and warehouses, and other buildings, in what county and incorporated town located, and the value of each, including the lands and lots upon which the same are built; the value of all machine shops and stationary machinery and tools therein, and in what county and incorporated town located, including the land upon which the same are built; all real, personal, or mixed property belonging to the company, within the State, not enumerated above, with ts value:

SEC. 2. *Be it further enacted*, That it shall be the duty of each railroad company to furnish and file the schedule above mentioned with the Comptroller, as provided herein, at the time and in the manner specified, and when any company has filed the same, or neglected and refused so to do, the Comptroller shall notify the Governor of the fact, and thereupon the Governor shall appoint three freeholders, being citizens of the State, one of whom shall be resident in each grand division of the State, and neither of whom shall be interested in or connected in any way with the management of any railroad, and shall commission them as Railroad Tax Assessors for the State at large; and these Assessors shall, before entering upon ther duties, respectively take and subscribe an oath before a Judge (who shall certify the same to the Governor), honestly, faithfully, and without fear, favor, or partiality, to discharge all the duties imposed upon him as such Assessor.

SEC. 3. *Be it further enacted*, That the Railroad Tax Assessors provided for herein shall be appointed and commissioned by the Governor within ten days after said first day of May, and said Assessors shall meet in the city of Nashville on the first day of June thereafter, and the Comptroller shall pass to them the schedules filed in his office, and certify to them what railroads, if any, have failed or refused to file the same; and said Assessors shall proceed at once to ascertain, test and value the PROPERTY belonging to said railroad company. In making such valuation they shall have in view and look to the capital stock, the corporate property, the franchises of each company, as well

as the gross receipts, and the individual stock of each shareholder; and to ascertain these facts, they shall have the power to summon before them any person, and to call for the books of any railroad company, and administer oaths, and examine any person so summoned touching any matter necessary to enable them to discharge their duties, and may direct their writs of summons to any Sheriff in the State, to be executed in his county; and any person so called on to testify shall be guilty of perjury if he shall falsely testify. Having ascertained, *in the manner indicated herein*, the character and total *value of all* the *property, wherever* situated, of any railroad company, and after having deducted from the aggregate value one thousand dollars, as well as the real cash value of the individual shares, they shall divide the same by the number of miles in the entire length of the road, and the result shall be the value per mile of the property of such company for the purpose of taxation, and the value per mile of any such railroad, as ascertained above, shall be multiplied by the number of miles in the State, and the product thereof shall be the sum to be taxed to such railroad company for State purposes; and the value per mile, as ascertained, shall be multiplied by the number of miles or fractions thereof lying and being in any county, and the product shall be the sum to be taxed for county purposes; and having ascertained the said several sums to be taxed, they shall certify the same to the Comptroller, together with the facts.

SEC. 4. *Be it further enacted*, That if any Railroad Company fail or refuse to file the schedule herein required, or having filed the same, the Assessors regard the same as not fair and just, said Assessors are hereby empowered and authorized to ascertain the items and value of any property, in such manner as they may deem best, and shall add ten per cent. to the taxes of said company so failing to file any schedule, or filing one not fair and just.

SEC. 5. *Be it further enacted*, That any two of said Assessors shall be and constitute a lawful Board of Assessors, and may do and perform all the duties enjoined upon them under this Act; and they may, jointly or singly, examine the property of any railroad company, and each shall be allowed his actual traveling

expenses, and a per diem of five dollars, while employed in the performance of the duties enjoined upon them by this Act, to be paid upon the warrant of the Comptroller, issued to each upon his stated account, out of any money in the Treasury.

SEC. 6. *Be it further enacted*, That when said Assessors shall have complied with the provisions of this Act, and certified to the Comptroller the amount to be taxed to each railroad company, together with all the facts, it shall be the duty of the Comptroller to submit the same forthwith to the Governor, Secretary of State, and the Treasurer, these being hereby constituted a Board of Examiners; and if, in the opinions of these three, or any two of them, the valuation so made and reported of any railroad company is too low, or is not just and fair, it shall be the duty of the Governor to appoint another Board of Assessors, and said last Board shall proceed at once to value the property, under the provisions of this Act, and to this end are empowered to do all the acts and things permitted herein to the first Board, and may adopt any facts found by the first Board; and the last Board shall certify the result, as soon as possible, to the Comptroller, and the same shall be final; *Provided*, that upon the happening of the contingencies of a "too low," unjust, or unfair valuation of said property by the first appointed Assessors, or three successors so appointed by the Governor in pursuance of this Act, no per diem shall be allowed for the services so allowed.

SEC. 7. *Be it further enacted*, That when the valuation of the property of any railroad company shall be ascertained and certified to the Comptroller, according to the provisions of this Act, it shall be the duty of the Comptroller to ascertain the amount of taxes due the State from each, and notify the company of the same, by letter or otherwise; and he shall certify to the County Court Clerk of each county in which a railroad line lies, the amount to be taxed in said counties respectively for county purposes; and likewise to the mayor of any incorporated town, the amount to be taxed by such town; and the County Court Clerk shall enter the same upon the Collector's books, specifying the amount of taxes to be collected as now provided by law.

SEC. 8. *Be it further enacted*, That the taxes so assessed in behalf of the State shall be due as other taxes, and if the same be not paid to the Comptroller within the time allowed other taxpayers, he shall proceed to collect the same in the manner following: He shall issue a distress warrant against the company for the amount thereof, and the same may be issued to any Sheriff in the State, whose duty it shall be to levy the same upon any personal property of the company to be found in his county, and sell the same as other property of like character is sold for taxes; and in the collection of said tax, the Comptroller is hereby empowered to do all acts and things which any collector of revenue is authorized to do by law; and should he fail to realize the taxes and costs from the sale of personal property or otherwise, he is hereby authorized and empowered to expose to public sale, to the highest bidder, all the property of such defaulting railroad company lying and being in this State, together with its franchises, after giving thirty days notice of the time and place of sale, in some newspuper published in the city of Nashville, and to make a deed of conveyonce thereof to the purchaser; and it shall be the duty of the Governor to issue his warrants to any of the Sheriffs along the line of said railroad, authorizing and commanding the Sheriffs to put such purchaser into full and complete possession of such road, and all its property, and the Sheriff shall execute the same at once.

SEC. 9. *Be it further enacted*, That the collector of taxes for any county shall collect the amount due to the county as is now provided by law in the case of delinquents.

SEC. 10. *Be it further enacted*, That the property of any railroad company lying or being in any city or incorporated town, may be taxed for city purposes upon a valuation thereof made upon the same basis as of the property belonging to a citizen tax payer.

SEC. 11. *Be it further enacted*, That each and every railroad company which will accept as a special amendment to its charter for a period of ten years from the first day of January, 1875, and that will pay annually to the Treasurer of the State one and one-

half per cent. on the gross receipts, from all sources, of such company, *shall be exempt from the provisions of the foregoing Sections of this Act*, and the payment of said one and one-half per cent. upon all gross earnings of such road, shall be in full *of all taxation*. The return of such gross receipts by said company to be made under oath by the President, Superintendent and Treasurer, to the Treasurer of the State, on the 10th day of January of each and every year, for the calendar year preceding, the first return and payment to be made on the 10th day of January, 1876, for the preceding year, and so for each succeeding year. If any railroad company, accepting the provisions of this Section, fails to make the return and pay in *the tax* in this section provided for, by the 15th day of January of each year, it shall be the duty of the Governor, Comptroller and Treasurer to demand the books, or papers, or both, of such company, necessary to make up such estimate, and when so made up by them shall be the amount of gross earnings for which such road shall be liable to pay on, and the Treasurer is hereby authorized to collect *the tax* thereon herein provided for, as other collectors of taxes in the State are authorized by law to do, together with a penalty of ten per cent. additional for failing to make the return, or payment, or for a false return as provided for. Such railroads as do not accept the provisions of this Section, shall be taxed as provided for in the foregoing Sections of this Act; *Provided*, that the charters of all railroad companies accepting the provisions of this Section shall be hereby so amended that after the expiration of said ten years, no exemptions of any property of said railroad company shall exist, but be placed upon the same footing as the property of other corporations or individuals. The charters of all railroad companies accepting the provisions of this Section, are hereby so amended that, after the lapse of the ten years aforesaid, every provision contained in the provisions of the charter of said companies, exempting their property from taxation, is hereby declared null and void, in as full and ample a manner as if the same was specially set forth in their respective charters.

Sec. 12. *Be it further enacted*, That this Act shall take

effect from and after its passage, the public welfare requiring it.

Passed March 20, 1875.

LEWIS BOND,
Speaker of the House of Representatives.
THOMAS H. PAINE,
Speaker of the Senate.

Approved March 24, 1875.

JAMES D. PORTER,
Governor.

CHAPTER XIX.

An Act to amend an Act entitled "An Act declaring the mode and manner of valuing the property of a railroad company for taxation," passed March 20, 1875, and to adjust the rights of the State and railroads in Tennessee under the decision of the Supreme Court, holding that the 11th section of said Act is unconstitutional.

[Acts Tennessee, 1877, pp. 31 to 34.]

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the Railroad Tax Assessors, provided for by an Act passed March 20, 1875, declaring the mode and manner of valuing the property of a railroad company for taxation, shall hold their office for two years, and until their successors are appointed and qualified.

SEC. 2. *Be it further enacted*, That at the first meeting of said Railroad Tax Assessors after their appointment, they shall elect one of their number as President of the Board; and said Assessors shall appoint a Secretary, who shall transcribe into a well bound book the entire proceedings of said Board, which record thus made by the Secretary shall be read over, corrected (if the same be necessary) and approved by the Board each day, and shall be signed by said Board; and said Secretary shall carefully preserve and file away all reports, documents, and proof taken, as used by said Assessors.

SEC. 3. *Be it further enacted*, That as soon as said Railroad Tax Assessors shall have completed their assessment of any railroad, they shall give notice for four days of said fact through one of the leading newspapers at Nashville, Knoxville, Jackson and Memphis; and all parties interested in said assessment may, in ten days after said publication, file exception to the same, with any proof that they may desire, which shall be examined by the assessors and passed upon; and if in their opinion their first assessment is erroneous, they shall correct the same and certify it to the Comptroller, as provided by section 6 of the Act passed March 20, 1875.

SEC. 4. *Be it further enacted*, That all proof taken by said assessors shall be reduced to writing, and be sworn to and signed by the parties; and said assessors shall make such rules and regulations as they may think proper as to notice and the time and mode of taking all proof, so as to afford the parties interested an opportunity to be present and cross-examine witnesses.

SEC. 5. *Be it further enacted*, That the Governor be, and he is hereby authorized to call a meeting of said Railroad Tax Assessors, at any time he may deem it necessary, to perform the duties imposed by this Act, and the Act amended by it.

SEC. 6. *Be it further enacted*, That the Railroad Tax Assessors, in giving railroad companies exemptions under section 3 of the Act passed March 20, 1875, shall deduct only one thousand dollars.

SEC. 7. *Be it further enacted*, That the assessment provided for by this Act and the Act passed March 20, 1875, shall be for two years, and for every succeeding two years there shall be a new assessment.

SEC. 8. *Be it further enacted*, That all railroads in the State shall, by the first day of May, 1877, and each successive two years thereafter, furnish the schedule and reports required by the Act of March 20, 1875; and the Railroad Tax Assessors hereafter to be appointed by the Governor, shall assess all railroads in the State, and where any railroads have not been assessed for taxation under the first ten sections of the Act of

March 20, 1875, by reason of having accepted and complied with the provisions of the 11th section of said act, or for any other cause, the Railroad Tax Assessors, when they meet, shall assess the railroad as aforesaid for the years 1875 and 1876, and also all railroads in the State for the years 1877 and 1878.

SEC. 9. *Be it further enacted*, That all railroads in the State which accepted and complied with the provisions of the 11th section of the Act of March 20, 1875, shall be entitled to a credit for the amounts respectively paid by them to the State upon the amounts due by them to the State under the assessment made, or to be made, under this Act and the Act of March 20, 1875, for the years 1775, 1876 and 1877; and if the amounts so paid by said companies shall exceed the assessment for said years, the excess shall be refunded by the State to said railroads, with interest.

SEC. 10. *Be it further enacted*, That where no assessment has been made against railroads by reason of the 11th section of the Act of March 20, 1875, or for any other cause, the assessment herein provided for shall have the same force and effect as if the same had been made by the Railroad Tax Assessors in 1875.

SEC. 11. *Be it further enacted*, That the Railroad Tax Assessors shall estimate the value of all engines, cars and rolling stock as belonging to the entire railroad upon which the same are operated, but such as belong in fact to other roads shall not be included in the estimate.

SEC. 12. *Be it further enacted*, That the salary of the Secretary of the Board herein provided for shall be four dollars per day for the time actually employed.

SEC. 13. *Be it further enacted*, That the action of the Board of Examiners provided for by the 6th section of the Act of March 20, 1875, shall be final and conclusive as to the value of a railroad. Said Board of Examiners shall examine the questions of assessment and valuation as upon an appeal upon the record made up by the Railroad Tax Assessors, and said Board of Examiners may, if they think the assessment made by the Railroad Tax Assessors is too high or too low, change the same so as to fix the real value of said railroads, which valuation shall be assessed

against them, and the taxes due thereunder be paid; *Provided*, that nothing in this Act shall prevent the authorities of the various counties and incorporated towns from assessing the value of all railroad property held in their respective counties and towns not included in the assessment herein provided for, or which may not be assessed by the assessors as herein provided; *Provided, further*, that no municipal corporation shall levy any tax upon any railroad that passes through it, in the aggregate, in excess of the rate of taxation levied by the county for the same period.

SEC. 14. *Be it further enacted*, That if any company operate and use, at the passage of this Act, more than one railroad in this State, connecting together as one line of road and branches thereof, whether the points of connection be in or out of the State, and any of such roads so used in connection with others, was, by the terms of the charter under which it was constructed, exempt on the first of January, 1875, from taxation, though another of such roads so used in connection was not so exempt by the charter under which it was constructed; then if such company operating and using such consolidated or connecting railroads, will pay the State and county taxes on all and every part of such railroads so connecting and used together, and on all property appertaining to or used in the operation of such roads, regardless of charter exemptions as to such properties, according to the provisions of this Act, from the first of January, 1875, to the first of January, 1885, all and every part of such roads so used together by one company, and all the property in use in the operation of such consolidation of roads, shall be exempt from any and all municipal corporation taxes from said first of January, 1875, to January 1, 1885; and the Railroad Tax Assessors shall take proof, as provided in the fourth section of this Act, to determine what companies shall be entitled to the benefit of this section; *Provided*, that any company which operates only one road which was exempt on first of January, 1875, shall be entitled to the benefits of this section; *and provided further*, that railroad companies which desire to avail themselves of the provisions of this section, shall signify their acceptance in writing, and file the same with the Railroad Tax Assessors by the first

day of May, 1877, and a failure to do so shall be construed as a waiver of the same.

SEC. 15. *Be it further enacted*, That incorporated towns through which railroads pass shall only tax such roads for such amounts as may be apportioned to such towns by the Railroad Tax Assessors, as provided for in this Act, and the said amended Act as modified by this Act; and that so much of the Act of March 20, 1875, amended by this Act as is in conflict or inconsistent with this Act, be repealed.

SEC. 16. *Be it further enacted*, That the President and Secretary of each railroad company shall verify the correctness and completeness of the schedules required by the first section of the Act passed March 20, 1875, amended by this Act, by affidavit made before some Judge of the State, and appended to such schedules; and that it shall be perjury for any such officer to wilfully knowingly swear falsely in such affidavit.

SEC. 17. *Be it further enacted*, That this Act shall take effect from and after its passage, the public welfare requiring it.

Passed March —, 1877.

EDWIN T. TALIAFERRO,
Speaker of the House of Representatives.
HUGH M. McADOO,
Speaker of the Senate.

Approved March 20, 1877.

JAS. D. PORTER,
Governor.

CHAPTER LXXII.

An Act to amend the Law in relation to the Consolidation of Railways.

[Acts Tennessee, 1877, pp. 92 to 94.]

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the Act of the General Assembly of this State as to consolidation of Railroads, approved the first day of De-

cember, 1871, and the Act of the General Assembly of this State, approved March 12, 1875, entitled "An Act relating to Consolidation of Railroad Companies," supplementary to the Act approved the 12th day of December, A. D. 1871, (page 59 Acts 1871,) entitled "An Act granting certain powers to existing Railroad Companies," shall extend and apply to all railroad corporations now existing or hereafter to be created in this State, whether under a general or special law or laws, or by virtue of Statutes of any other State, ratified and confirmed by the authority of the State of Tennessee; *Provided*, That no railroad corporation indebted to the State of Tennessee shall be entitled to the benefit of said Act or of this Act, until such corporation shall have fully paid off and discharged all such indebtedness actually due at the date of such consolidation.

SEC. 2. *Be it further enacted*, That any Railroad corporation existing, or which may hereafter exist in this State, whether created under a general or special law, or existing by virtue of charter or law of this State or of any other State, ratified by this State, and authorized to maintain and operate a railroad within this State, shall have the right and power to consolidate itself with any other railroad corporation whose road shall connect with or intersect the road of such railroad corporation, or any branch thereof; upon such terms and conditions, and under such corporate name as shall be agreed upon in writing between such corporations respectively. *Provided*, That nothing herein contained shall affect or impair in any way any mortgage, right, lien or claim of the State of Tennessee, or the rights of any creditor of such corporations, and that no such consolidation shall be consummated or be completed until it and the terms thereof shall have been approved by a majority of stockholders of such consolidating companies, respectively; *and provided further*, That the agreement of such consolidation, together with the evidence of the approval thereof, by such stockholders, shall be filed in the office of the Secretary of State, and by him recorded, *and provided further*, that such agreement of consolidation shall not be of any force or effect until said Railroad Company or Companies, shall have paid off and discharged all indebtedness, if any, actually due by them or either of them to the State of Tennessee at the date of such consolidation.

SEC. 3. *Be it further enacted*, That the said corporation so formed by the consolidation of two or more railroad corporations, as aforesaid, shall have, possess and exercise, all the rights, powers, privileges, immunities, and franchises, and be subject to all the duties and obligations, (not inconsistent with the provisions of this Act) conferred and imposed by the laws of this State upon such companies so consolidating, or either of them. And said consolidated company shall have power to fix the number of its Directors and the time of their election; the number, names and duties of its officers; to pass by-laws for the government of the company, and the management of its affairs; to fix the amount of its capital stock, which shall be divided into shares of $100 each, and issue bonds and dispose of the same in such form and denomination, and bearing such interest as the Board of Directors may determine, and to secure the payment thereof by mortgage of every and all the property and franchises of said consolidated company and of the companies from which it was formed; and to do all other acts and things which the said companies, so consolidating, or either of them, might have done previous to such consolidation; *Provided*, That nothing in this Act shall be understood or construed to give or to transfer to, or confer upon, any such consolidated company, or company or person operating such consolidation of railroads, as provided for in this Act, or in any other law of this State, any franchise, right, power, immunity or exemption not now granted by the laws of this State to the railway companies which may form part of such consolidated company. *Provided further*, That no exemption from taxation under the revenue laws of this State, of Railroad property and franchises, and capital stock thereon, contained in railway charters or other railway laws of this State, shall be, by this Act, or any other law of this State providing for such consolidation, transferred to, or conferred upon such consolidated company, or the property and franchises and capital stock therein, of such consolidation of railroads, or of the property appertaining thereto and used in the operation thereof; and that the State shall have the power, by appropriate legislation, to prevent unjust discriminations against, and extortions for freights and passage over all railroads in this State; *and provided further*, that no railroad company shall have power under this Act or any of the laws of this State, to give or

create any mortgage or other kind of lien on its railway property in this State, which shall be valid and binding against judgments and decrees and executions therefrom, for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of its railroad in this State.

SEC. 4. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it.

Passed March 23, 1877.

HUGH M. McADOO,
Speaker of the Senate.

EDWIN T. TALIAFERRO,
Speaker of the House of Representatives.

Approved March 24, 1877.

JAS. D. PORTER,
Governor.

CHAPTER XVI.

An Act to amend an act entitled An Act declaring the mode and manner of valuing the property of a railroad company for taxation, passed March 20, 1875, also to amend an act entitled "An Act to amend an act entitled An Act declaring the mode and manner of valuing the property of a railroad company for taxation, passed March 20, 1875, and to adjust the rights of the State and railroads in Tennessee under the decision of the Supreme Court, holding that the 11th section of said act is unconstitutional," approved March 20, 1877; also to amend an act entitled "An Act to amend an act passed 20th March, 1875, entitled An Act to declare the mode and manner of valuing the property of railroad companies for taxation, approved April 5, 1881.

[Acts Tennnessee, Second Extra Session, 1882, pp. 20 to 22.]

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That all the property, hereinafter termed distributable property of all the railroad companies owning or operating railroads in this State, shall continue as heretofore, to be assessed for the purposes of State, county and municipal taxa-

tion by the railroad tax assessor for the State at large, appointed by the Governor. And all other property, real, personal and mixed, of said railroad, hereinafter termed localized property, shall be assessed for all taxes, State, county and municipal, by the county assessor and the assessors of municipal corporations, under whose charter they have the right to assess property for taxation. Assessments of railroad property shall be made in the manner prescribed by this act and the acts amended by it, except in so far as the amended acts have been declared unconstitutional by the Supreme Court.

SEC. 2. *Be it further enacted*, That the road-bed of a railroad shall include all side tracks, switches, bridges and trestles, and the ties, rails and fastenings, and superstructure of every kind.

SEC. 3. *Be it further enacted*, That the road-bed, rolling stock, franchise, choses in action, and personal property of a railroad company having no actual situs, shall be known as its distributable property, and shall be valued by said assessors separate from the other property of the company, and after having ascertained the total value of such distributable property, wheresoever situated, whether within or without the State, and after having deducted from its value one thousand dollars, they shall divide the remainder by the number of miles in the entire length of the road, and the result shall be the value per mile of such distributable property of such company for the purpose of taxation; and the value per mile of such distributable property, as so ascertained, shall be multiplied by the number of miles in the State, and the product thereof shall be the sum to be taxed to such company upon such distributable property for State purpose; and the value per mile, as so ascertained, shall be multiplied by the number of miles or fractions thereof, in each county and incorporated city or town through which the road passes, and the products shall be the sums to be taxed upon such distributable property by said counties, towns and cities respectively.

SEC. 4. *Be it further enacted*, That the depot buildings, yards, grounds and other property, real, personal and mixed, having an actual situs, shall be known as the localized property of such

railroad, and shall be valued by the county assessors and city assessors of the several districts and wards in which such property is situated, in the same manner and upon the same principles that govern the assessment of similar property owned by individuals, and it shall be valued by said county assessors and city assssors in the respective counties, towns and cities in which it is located. The State shall be entitled to a tax upon all such localized property, the counties, towns and cities shall be entitled to a tax upon the value of all such localized property as is situated within their respective limits.

SEC. 5. *Be it further enacted*, That the cash value of the individual shares shall not be deducted from any of said valuation, nor shall any railroad company have any exemption, except one thousand dollars, it being the exemption allowed to the other taxpayers of the State.

SEC. 6. *Be it further enacted*, That all valuations or assessments which may have been made by county, district or ward assessor for the year 1882, shall be superceded by the assessment herein provided for. And the chairmen or judges, of the several county courts, shall cause the localized property to be assessed, by the district and ward assessors appointed for the present year, or others appointed by the chairman or judge in place of any when vacancies have occurred. And in cases in which there shall be a failure to assess such property, under this act, it shall be assessed by the trustee or tax-collector, as in other cases of omission. Assessments to be made by the county assessors, under this act, shall be made by the assessor, and acted on by the board of equalization, by the first Monday in June, 1882, or as soon thereafter as practicable.

SEC. 7. *Be it further enacted*, That it shall be the duty of the clerk of the County Court of each county, wherein the assessors of any district or ward shall have made assessments of any localized property of any railroad company, as hereinbefore provided, to make out and forward to the comptroller, on or before the first day of May in each year, a full and complete schedule and a list of such localized property so assessed by such district or ward assessors, and these lists and schedules shall be

submitted by the comptroller to the State Board of Railroad Tax Assessors for the State at large, together with the reports filed by the railroad companies.

SEC. 8. *Be it further enacted*, That this act take effect from and after its passage, the public welfare requiring it.

Passed April 26, 1882.

GEO. H. MORGAN,
Speaker of the Senate.

H. B. RAMSEY,
Speaker of the House of Representatives.

Approved April 26, 1882.

ALVIN HAWKINS,
Governor.

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JAMES H. McKENNEY.
CLERK.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1885.

No. 934.

State of Tenn. et als., Pl'tiffs in Error,

vs.

Geo. K. Whitworth, Trustee of Davidson County, Defendant in Error.

DODD & LANIER,

Attorneys for Davidson County.

Marshall & Bruce, Stationers, Nashville, Tenn.

UNITED STATES SUPREME COURT,

OCTOBER TERM, 1885.

No. 934.

STATE OF TENNESEE, ET ALS.,

PLAINTIFFS IN ERROR,

Versus

Geo. K. Whitworth, Trustee of Davidson County,

DEFENDANT IN ERROR.

DODD & LANIER, *Attorneys for Davidson County.*

The complainant seeks to have assessed for taxation the shares of the stockholders in the railroads mentioned in the petition. This is resisted upon several grounds, the principal of which is—

First, That the shares or property sought to be taxed is exempt from taxation under the charters of the respective railroads mentioned; and,

Second, Because if not exempt under said charters, the stockholders in said railroads are non-residents, and are, therefore, beyond the taxing power or jurisdiction of the State.

The section of the charter under which the exemption or immunity from taxation is claimed is in the following words: "The capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, warehouses and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer." It will be seen from the section of the charter quoted that it is the capital stock of the corporation that is the subject of exemption, and not the shares of individual

stockholders. That there is a well-defined distinction between the capital stock of a corporation and the shares of individual stockholders is now too well settled by authority, both State and Federal, to admit of doubt or argument. The distinction in this State was made as early as 1836, in the case of the Union Bank *v.* the State, reported in 9 Yerger, 490. This case has been affirmed time and again in this State, and was cited approvingly and with expressions of high commendation by the Supreme Court of the United States, in the case of Memphis *v.* Farrington, reported in —— Otto.

But, notwithstanding this distinction, it is insisted for defendant, that it was the intention of the Legislature, in the exemption clause heretofore quoted, to relieve from the burden of taxation the shares of the stockholders. This question of course depends for its solution upon a proper construction of the clause referred to. It will be borne in mind by the court that at the time the charter of the railroads mentioned were granted, and consequently at the time the exemption clause under which immunity from taxation is claimed on behalf of the stockholders in said railroad corporations, that the distinction heretofore mentioned between the capital stock of corporations and the shares or stock therein held by individuals was well established in this State, and was well understood by the Legislature which granted the charters containing the exemption clause under consideration. Exemptions from taxation have never been regarded with much favor in this country, and therefore all laws undertaking to exempt property from taxation have been construed by the courts with the utmost strictness and with the least possible liberality. That all property should pay its proportional part of the expense incident to the administration of government is but a reasonable demand upon the property owner. For whatever may be paid by him in this way, he is well compensated by the protection afforded by government, in the maintenance of his liberty and the preservation of his property, and especially in the increase to the value of his possessions by the use to which the money contributed is applied. In this country taxation of

property is the rule; exemption the exception. Exemptions from taxation, say our Supreme Court, are contrary to public policy and can only be allowed when granted in clear and unmistakable language If the language under which it is claimed leaves it doubtful, the benefit of the doubt must be given the State, the life of which is taxes.

9 Bax., 551; 7 Lea, 665.

They are not creatures of intendment or presumption. Mr. Cooley, in his excellent work on taxation, says all exemptions are to be strictly construed. "They embrace," says the author, "only what is within their terms." Exemptions, no matter how meritorious, are of grace and must be strictly construed. In the case of Providence Bank *v.* Billings, Chief Justice Marshall said: "As the whole community is interested in retaining it undiminished"—meaning the right of taxation—"the community has the right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon does not appear."

4 Peters, 174.

In the case of the Ohio Life Ins. and Trust Co. *v.* Deholt, Chief Justice Taney said: "The rule of construction in cases of this kind has been well settled by this court. The grant of privileges and exemptions, says the learned Judge, to corporations, are strictly construed against the corporation and in favor of the public. Nothing passes but what is granted in clear and explicit terms, and neither the right of taxation nor any other power of sovereignty which the community have an interest in preserving undiminished, will be held by the court to be surrendered unless the intention to surrender is manifested by words too plain to be mistaken. Nor does the rule," he continues, "rest merely in the authority of adjudged cases. It is founded on principles of justice, and necessary for the safety and welfare of every State in the Union. For," says he, "it is a matter of public history, which this court cannot refuse to notice, that almost every bill for the incorporation of banking companies, insurance and trust companies, railroad companies, or other cor-

porations is drawn originally by the parties who are personally interested in obtaining the charter, and that they are often passed by the Legislature in the last days of its session, when, from the nature of our political institutions, the business is unavoidably transacted in a hurried manner, and it is impossible that every member can deliberately examine every provision in every bill upon which he is called upon to act."

16 Am., 238.

So, in the later case of Morgan *v.* Louisiana, the Supreme Court of the United States say "intendments will not be indulged to inlarge the operation of a claim restraining the exercise of a sovereign attribute of a State. As has often been said by this court," says the learned Judge delivering the opinion, "the whole community is interested in retaining the power undiminished, and has the right to insist that its abandonment shall not be presumed in any case where the deliberate purpose by the State to abandon it does not appear." Further illustrating the principles that exemption laws in reference to taxation are to be strictly construed, and that they should only embrace what is within their terms, the court is referred to the following cases: 22 Penn., 496, in which it was held that a law exempting from taxation universities, colleges, academies and school-houses did not embrace or extend to an academy of fine arts, as none, say the court, can claim an exemption, unless the exemption be so clearly expressed in the statute as to admit of no other construction. An exemption of all houses of religious worship and pews and furniture within the same, will exempt only that part of the building occupied for religious worship, and if other portions are leased for business purposes, they are taxable.

1 Met., 533.

An exemption of such real estate of literary and scientific institutions as shall be actually occupied by them or by the officers of such institutions for the purposes for which they were incorporated, will not extend to a house built on the real estate of Harvard College, and leased by the corporation to one of the professors for a dwelling.

Pierce *v.* Cambrige, 2 Cush., 611.

Under an exemption of school buildings, a building occupied in part for a school and in part for other purposes, is not exempt.

17 Mo., 335.

An exemption of every school-house and every building erected for the use of a college, incorporated academy, or other seminary of learning, held not to embrace a building used and occupied for a private boarding school.

13 N. Y., 220.

24 N. J., 497.

The charter of a bank provided that it shall pay to the State an annual tax of one-half of one per cent. on each share of its capital stock, which shall be in lieu of all other taxes, and also that the bank may purchase and hold a lot of ground for the use of the institution as a place of business, and at pleasure sell or exchange the same, and may hold such real estate and personal property as may be conveyed to it, to secure debts due to it, and may sell and convey the same. The bank bought a lot and improved it for a place of business, but used only one floor for this purpose, renting the cellar and the second and third stories to other parties. Under this state of facts the court held that the realty held and used as a place of business was exempt from taxation to the extent of the assessed value of that part so used, but that the residue of the assessed value of that realty was subject to taxation like other similar property.

Bank of Commerce *v.* McGowan, 6 Lea, 703.

In the case of the DeSoto Bank *v.* City of Memphis, the court held that a clause in the charter of a bank exempts from taxation a building which the company are allowed to erect, under the charter, for the purpose of carrying on the business of the bank, if any part of such building be not so occupied, but is leased out, the exemption will reach and cover only so much of the building as is necessary for the use of the bank.

6 Baxter, 415.

Many other cases of like import, illustrating the principle, might be cited, but it seems to be so clear, so just and so well established, it is not considered necessary to do so.

Measured and tested by these principles, it seems plain and manifest that the Legislature in exempting from taxation the capital stock of the corporation mentioned, did not intend to include in the exemption the shares of stockholders. It was the capital stock of the corporation the Legislature had in view. It was the corporation itself the Legislature was dealing with and legislating about. It was the corporation as an entity the Legislature was intending to encourage, assist and benefit, and not the individual members thereof, although the latter necessarily, to some extent, were the recipients of all benefits bestowed upon the former. The company or corporation wanted to build a railroad, and wanted to enjoy certain rights and franchises; the State was disposed to be liberal and accommodating, and says to the corporation, build the road and we will not only exempt forever your capital stock from taxation, but likewise your road, etc., for the period of twenty years from completion. If the Legislature had intended to exempt the shares of stock held by individuals from taxation, then the intention would not have been left a matter of doubt, surmise or conjecture, but would have been expressed in clear, unambiguous and unmistakable language, because the Legislature at that time well knew the distinction that existed between the capital stock of a corporation and the shares held therein by individual members.

The case of Memphis *v.* Farrigton is not against this view. That case turned altogether upon the peculiar wording of the act embracing the exemption. The act provides that "said institution shall pay to the State an annual tax of one-half of one per cent. on each share of capital stock, *which shall be in lieu of all other taxes.*"

The act of 1869-70 provided that all shares of stock in any bank, corporation or company, now or hereafter incorporated by or in pursuance to any law of this State, shall be valued and assessed and subject to taxation.

Under the provisions of the act last referred to, the City of Memphis, as well as the County of Shelby, claimed the right to tax the shares of stock owned by the stockholders in the companies sued. This was resisted upon the ground that the shares of stock held by said stockholders were embraced and included in the exemption clause heretofore quoted; that said exemption was a contract, and that to enforce the taxes imposed by the act of 1869-70 was to impair the obligation of the contract in violation of the Federal Constitution. Our Supreme Court held that the shares of stockholders in the corporations mentioned were not embraced in the exemption clause, and that they were properly the subject of taxation under the act mentioned. The case was then taken to the Supreme Court of the United States, which held that the exemption clause did embrace the shares held and owned by stockholders, and therefore they could not be taxed otherwise than provided in the charter of incorporation.

Upon a careful reading of the opinions of the court in this case, it is manifest the court would not have held as it did but for the words, "in lieu of all other taxes," which were embraced in the exemption clause of the charter of incorporation. This conclusion is strengthened by the fact that the court, in the most emphatic manner, indorsed and affirmed the case of the Union Bank *v.* Tennessee, heretofore referred to. In this case, the language of the exemption clause of the charter, being the eleventh section of the same, is almost identical, with the exemption construed in the case of Memphis *v.* Farrington, the only real difference being that in the Union Bank charter, the words, "in lieu of all taxes," were not embraced. The Union Bank charter exemption was as follows: "That in consideration of the privileges granted by the charter, the bank agrees to pay, annually, the one-half of one per cent. on the amount of the capital stock paid in by the stockholders other than the State." The charter of the Union Bank was passed in 1832. In 1836 the Legislature passed a revenue act, enumerating the different kinds of property which should be liable to taxation, and, among other things mentioned, was bank stock. Under this act the shares of the individual stockholders was sought to be

taxed, which was resisted upon the ground assumed that the shares constituted the capital of the bank, which it was claimed was exempt from taxation under the charter; that the tax sought to be imposed was in violation of the charter exemption, and was therefore violative of the Federal Constitution, and that the act imposing it was unconstitutional. The court not only held that the shares of individual stockholders was not the capital stock of the corporation, but, in effect, also held that the shares of stock owned by the stockholders in said bank were the subject of taxation, they not being embraced in the charter exemption.

In this case it will be remembered that the shares of stock were sought to be assessed the price of their first cost, and that the owners, regardless of place of residence, were sought to be taxed in Davidson County, and that the payment of the tax so assessed was sought to be reached through the bank. For these reasons, and not because the property was exempt from taxation under the bank charter, the court decided the case against the State, and in favor of the bank. The able opinion of the court concludes as follows: "We therefore think that, as the Union Bank has purchased from the State for a valuable consideration the right to use her capital stock in banking operations; that the State has no power, without the consent of the bank, to impose any additional burthen by way of taxation in the enjoyment of this right, but this may be done from the stockholders or owners, which must, however, be taxed like other property, at its cost value, and not at its first cost, so that the equality of taxation may be preserved.

If the point were not a matter of adjudication, it would admit of grave consideration, whether these chartered exemptions in contemplation of the Constitution of the United States amount to a contract. They are purely voluntary grants upon the part of the government without any consideration whatever passing to the State from the corporation. But the point being adjudged, the surrender, when claimed, must be shown by clear, unambiguous language which will admit of no reasonable construction consistent with the reservation of the power,

Measured and tested by these established principles, we submit in confidence that the shares owned by the stockholders in these corporations are not embraced in the charter exemption. The Legislature in granting the exemption was not treating with the individual members of the corporations. Indeed, and in fact, no stockholders were in existence at the time. It was the corporate body that was stipulating for the franchise and the exemption from taxation of the corporate property. The Legislature granting the chartered exemption was made up in part of lawyers, learned and distinguished in their profession. The charter itself was drawn up with great care after much thought and deliberation by some of the most eminent lawyers of the State, and certainly if it had been intended by them that the shares of the stockholders in the corporation should be exempt from the burden of taxation, it would have been so expressed in language so plain and so intelligible as to admit of no doubtful construction. There is no reason why this should not have been done, on the contrary, there is every reason why it should have been done, if such was the desire of the corporation in the will and intention of the Legislature. It would have been an easy matter in this instance to have made the purpose of the Legislature clear beyond doubt, to exempt the shares of stock as well as the capital stock of the corporation itself had such been the purposes of the Legislature or the wish of the corporation by declaring in express terms that the shares of stockholders as well as the capital stock of the corporation itself shall be forever exempt from taxation. And especially should the Legislature in this instance have so declared its purpose if such was its intention, especially as the matter had at that time been the subject of judicial consideration and determination, and a broad and well-defined distinction had been established between the two kinds of property. It was at that time well known, to the profession at least, that the capital stock of a corporation and the shares held therein by stockholders were very different, and that while the one might be exempt from the burden of taxation, the other was not necessarily so, and to hold in view of this fact that the learned lawyers who drew the charter under consideration,

and who were employed for that purpose, would not have expressly and in unequivocal language exempted the shares of the stockholders from taxation if such was their intention or the intention of the Legislature, would be to convict them of an inexcusable oversight, if not of a gross dereliction of professional duty. Even if the court in construing the exemption clause now being considered, should look not only to the language used in giving expression to the legislative intention, but should also look to the surrounding and attendant circumstances of the transaction. Still in view of the principle and in the light of the authorities referred to, the conclusion is irresistable, that if an exemption of the shares of stockholders from taxation had been intended, thought of or contemplated, the intention would have been made manifest by the clearest language at the command of those who formulated the statute. No other conclusion is at all consistent with the high character and pains-taking care of the eminent gentlemen who were employed to draft the act. In the framing and passage of the act, the individual interest of stockholders, so far as the shares of stock to be owned and held by them was concerned, were not thought of, much less were they made the object of legislative grace in the way of immunity from taxation.

The charter exemption so far discussed is in this act of legislation, incorporating the Nashville & Chattanooga Railroad, there being no such exemption in the charter of the Nashville & Decatur Company. The legislature in incorporating this last company did not, in express terms, exempt any of its property from taxation, capital stock, or otherwise; but only conferred upon it such rights, powers, and privliges as had been given to the Nashville & Chattanooga Company under its charter. In an ably-argued and well-considered case, our Supreme Court held, that the words mentioned did not include or carry with them the exemption from taxation embraced in charter of the Nashville & Chattanooga Company.

James H. Wilson, Receiver, *v.* James L. Gaines, Comptroller, 9 Baxter, 569.

The legislature, in incorporating several of the railroads

of the State, used the same language in the acts of incorporation as it did in the Nashville & Decatur road, and whenever the matter has come before our court, for judicial construction, the court has uniformly held that the word privilege did not carry with it the right of exemption. The distinction or difference in the meaning of the two expressions or terms is not only made by our court, but was used in the Constitution of the State itself. In the Constitution of 1834, which was adopted long before, and was the supreme law of the State at the time of the incorporation of the Nashville & Decatur, Section 7, Article 9, the following language is found: "The Legislature shall have no power to pass any law granting to any individual or individuals rights, privileges, immunities or exemptions other than such as may," etc. In the case last cited, says the learned judge who delivered the opinion, a legislature, acting under the constitution for its powers, and as defining its duties, must be conclusively presumed to have used a word or term of the Constitution in the sense and with the meaning given it by that Constitution. We are satisfied the term "privileges," as employed in that Constitution, in the connection in which it appears, was used in its restrictive sense, and did not carry with it an immunity from taxation. The authorities, to the contrary, are based upon statutes where the restrictive meaning of the word "privilege" was not given it by the Constitution of the State, as is the case in our State. No case can be found, it is respectfully submitted, where the words "privileges" and "immunities" have been held to be of little import and meaning, conveying the same idea and meaning the same thing, when the Constitution of the State itself has made a distinction between them, as has ours.

Upon these decisions we confidently rely as giving the proper definition and meaning to the word "privileges," and a definition which this honorable court is bound to accept. The law as established by a long and unbroken line of adjudications of this court establish beyond question the principle that in construing the Constitution and statutes of a State the construction placed upon them by the highest courts of that State, where no law of Congress or the United

States Constitution is infracted, is binding upon the United States Courts. So also the words "capital stock," as used in the charter of the Nashville & Chattanooga Road, had impressed upon them, by a decision rendered in the Union Bank case, 9 Yer., anterior to the grant of said charter, a certain well-defined meaning. That case, as well as other decisions subsequently rendered, already referred to, expressly hold that "capital stock of a corporation does not include the shares of the stockholder." If, in our position, that these decisions are binding upon this honorable court, then no question can here be made as to their meaning. Under the construction given by the State court, therefore, there is no contract of exemption from taxation. Of course on the question of impairment of a contract the Federal decisions alone govern. Citation of authority is unnecessary to establish the propositions announced as to the controlling influence through comity given to the decisions of the courts of last resort of the States, for these principles are axiomatic.

It is also claimed that if the stock or shares, in the corporations in question, are not exempt under the charter, that the owners or holders of the stock are non-residents, and therefore these shares cannot be taxed in this State. There is a peculiarity about this species of property, that does not attach to any other. Independent of legislation, it has in reality no distinct locality. It is said by a very high authority that it is not located where the corporation is situated; nor has it in reality a locality or location where the owner resides. The *situs* is fixed where the State through whose Legislature the corporation is created sees proper to locate it. The proposition is not contradicted that the power of taxation by the State is limited to persons, property or business within its jurisdiction. Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its *situs* at his domicil. But for the purpose of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located. If the State has actual jurisdiction of the person of the owner, it operates upon him directly. If he is absent, and it has jurisdiction of his property, it operates upon him through

his property. Shares of stock in these railroad corporations are personal property. In one sense, it is true, they are intangible and incorporeal, but the law which creates them may separate them from the person of their owner for the purpose of taxation, and give them a *situs* of their own. This has been done in this as well as in other States; and the laws everywhere, where no constitutional inhibitions were in the way, has been sustained by both the State and Federal courts. The act by the Tennessee Legislature thus separating this species of property from the person and giving it a *situs* of its own was passed March 1, 1869, and this act, immediately upon its passage, at once became the law of this species of property for purposes of taxation. Being the law of the property itself, every person, as holder or owner, takes the property subject to this power of taxation under State authority, and every non-resident, by becoming an owner, voluntarily submits himself to the jurisdiction by the State in which the corporation is located, for all the purposes of taxation on account of his ownership. His money invested in the shares is withdrawn from taxation, under the authority of the State in which he resides, and submitted to the taxing power of the State where, in contemplation of law, his investment is located. The State, therefore, where the corporation is located or established, has jurisdiction for the purpose of taxation of all the shareholders of the corporation, both resident and non-resident, and of all its shares, and may therefore legislate accordingly. The general government has exercised this power over the shares of the national banks, and why should not the State exercise the same right over property which is the erection of her own Legislature? That the Legislature in incorporating these roads had the power and could have provided in their charters that the holders or owners of stock therein, whether resident or non-resident, should pay taxes thereon to the State, there can be no doubt; and if this had been done, that the State could have collected taxes on the shares held by non-resident owners is equally clear. If she had the power in granting the charters to fix the *situs* of shares of stock and demand the payment of taxes thereon, and enforce the collection thereof